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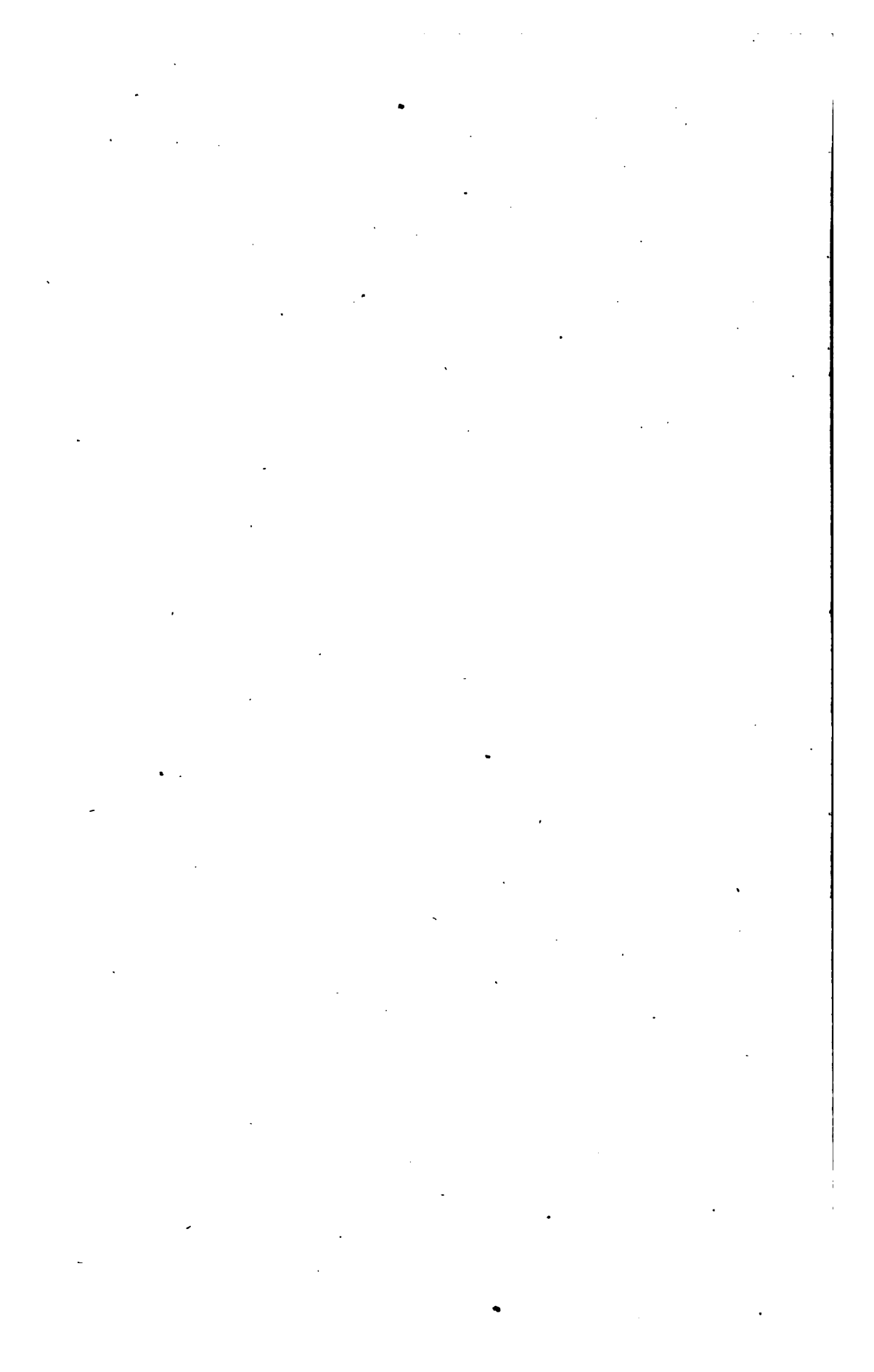
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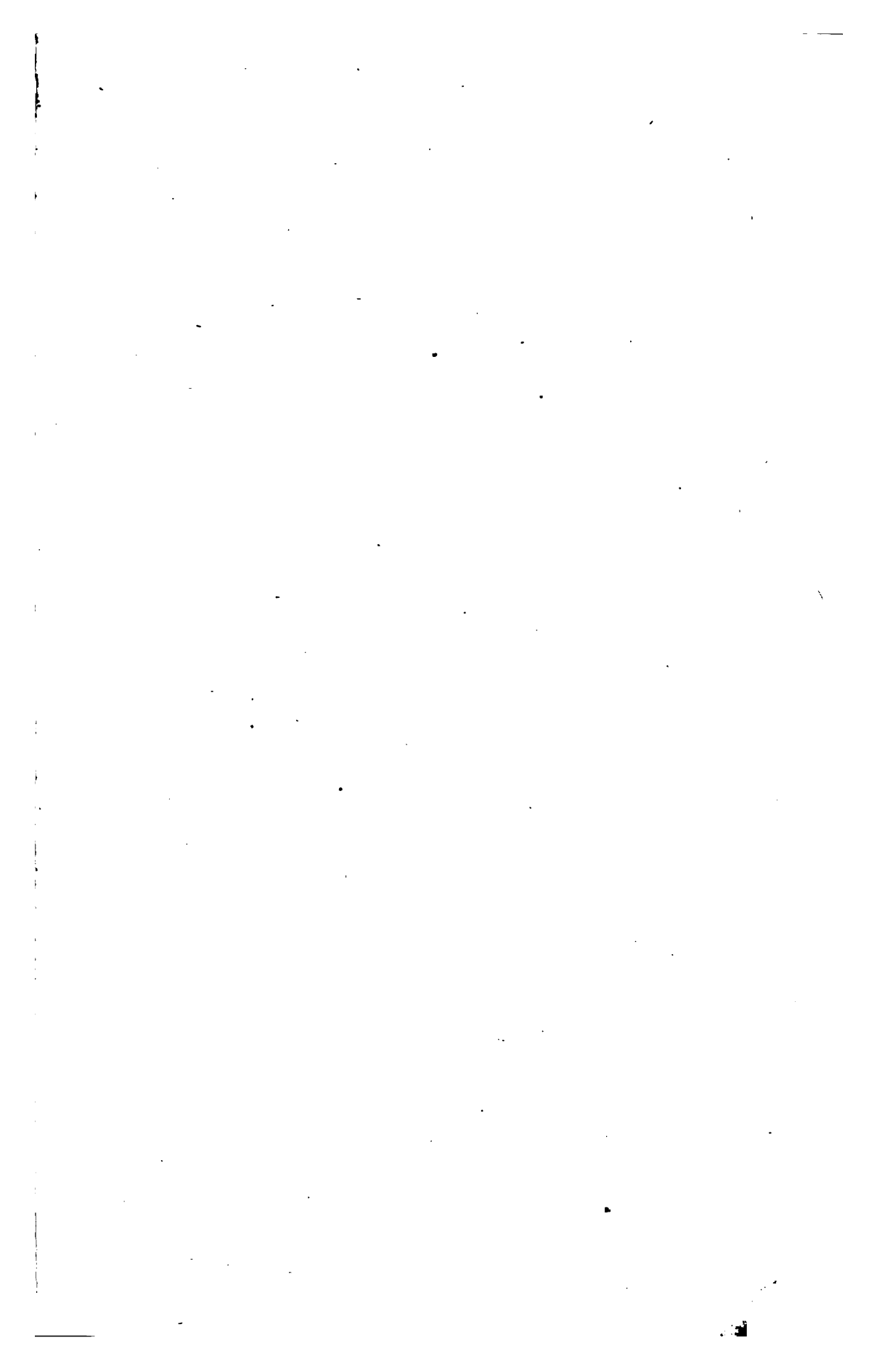
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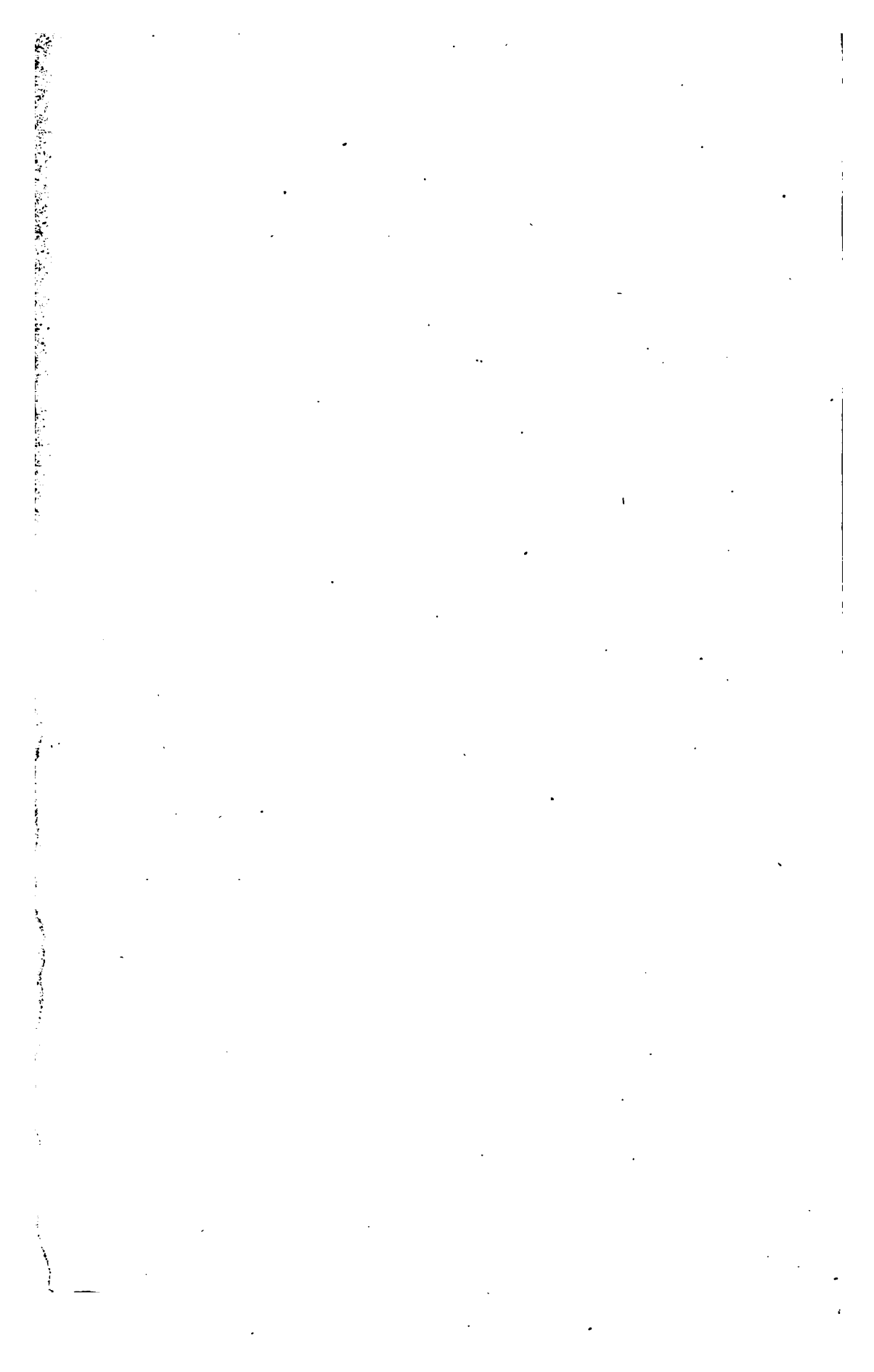




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**COMMON LAW.**

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BY CHARLES PETERSDORFF, ESQ.

OF THE INNER TEMPLE

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## ADVERTISEMENT

TO

### THE FIFTEENTH VOLUME.

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MANY years have elapsed since the author first contemplated the laborious and responsible undertaking of collecting, translating, arranging, epitomising, and annotating upwards of 60,000 decisions, comprised in not less than 240 volumes. When he embarked in the work he presumed to hope, that if he should succeed in executing the engagement in a moderately skilful manner, he should be performing no unacceptable service to the profession. He has now, to the utmost of his ability, brought his protracted labours to a termination; and, with mingled feelings of diffidence and anxiety, submits the result to the considerate inspection of the public.

The comprehensive design and varied contents of the work have been minutely explained and commented upon in the preface to the first volume. The scheme there unfolded has been adhered to in every part of the publication with a scrupulous fidelity. Much pains and labour have been bestowed upon the very elaborate Index given to the whole publication at the end of the present volume, and to which the inquirer in every instance should refer, instead of merely relying on the alphabetical arrangement of the body of the work, especially when seeking information upon titles or divisions that might, with propriety, be placed under two or more heads or classes of cases. In this Index have been carefully inserted such new decisions, or parliamentary regulations, as have been pronounced or introduced subsequent to the printing of the different volumes. In order fully to realise the author's original scheme, it is proposed, at a very early period, to prepare a collection of forms, or precedents, applicable to every title, or division, in the elementary portion of the Abridgment, with all the practical information that by the most active inquiries and diligent research can be obtained. A volume containing an Abridgment of the Reports from the Michaelmas Term 4 Geo. IV. is in a course of preparation, and will be shortly produced. Similar volumes will be regularly and periodically compiled; so as to keep up an uniform series of Digests of the Reports, and enable the purchasers of this Abridgment to obtain a ready and systematic acquaintance with all the modern Adjudications, new Rules of Court, and progressive Alterations of the Law.

It will be observed that the compiler has, in the notes to the cases, unsparingly availed himself of all the information the different text and elementary writers could afford: he has, however, rarely introduced passages of any length from the works of other authors, without acknowledging the extent and nature of the obligation. If he has on some occasions omitted, through inadvertance, to insert the name of the individual to whose labours he may be indebted, he begs now distinctly to state, a considerable number of the very elaborate notes appended to the decisions abridged, and which constitute the elementary portion of his work, were taken from writers most distinguished

for the ability and research displayed on the particular subject made by them an object of investigation. Subject to this general acknowledgment, it is only compatible with justice to his own efforts to state, that the rest of the notes were compiled and written by himself expressly for the present comprehensive undertaking.

The author cannot conclude this short address without acknowledging the kind and valuable assistance he has, on many occasions, during the progress of the work, experienced from his pupils, and in particular the advantage he has received from the industry and ability of his friend, and late pupil, Mr. James Hooper Dawson, who has very recently favoured the profession with a valuable and practical Treatise upon the Law of Attorneys and Solicitors.

6, CROWN OFFICE-ROW, TEMPLE.  
27th Sept. 1830.



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A  
PRACTICAL ABRIDGMENT  
OF THE  
REPORTS OF CASES  
ARGUED AND DETERMINED

IN THE  
COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER,  
FROM THE RESTORATION IN 1660, TO  
MICHAELMAS TERM, 4 GEO. IV.

**Tacking.** See *ante*, tit. *Mortgage*,

**Tales.** See *ante*, tit. *Jury*.

**Tanner.** See *ante*, tit. *Leather*.

**Taxation of Costs.** See *ante*, tit. *Attorney*, and a Practical Treatise on Attornies, by J. Hooper Dawson, Esq. of the Inner Temple.

**Taxes.\***

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TO, p. 5.

I. RELATIVE TO THE DIFFERENT KINDS OF.

[ 2 ]

(A) ASSESSED.

1. SOLLETT AND GLASS'S CASE. H. T. 1820. Ex. 8 Price, 123. n. S. P. Lodging

WRIGHT'S CASE. 1807. Ex 8 Price, 125. n.

In this case it appeared that the houses in question were let as lodgings in places of public resort, and which were so occupied by various families having them for the season, and during the remainder of the year were left wholly unoccupied. The Court held they were chargeable to the assessed taxes for the whole year.

\* By taxes is meant, in general, parliamentary; Salk. 615; *ante*, tit. *Covenant*. The King has an inheritance in taxes so granted; *Brewster v. Kitchen*, 1 Ld. Raym. 320.

† And where defendant used part of a smaller house, adjoining to his own dwelling-house, and having an internal communication as an office for conducting his business as an attorney: held, that was not within the exemption of 57 Geo. 3. c. 25, from the window tax: *Rex v. Dyden*, 8 Price, 103. So the lower room of a dwelling-house, used as an accountant room, having no internal communication: 8 Price, 192; so, the window of a shop, having no internal communication; *ibid.* 106; and the upper part of a dwelling-house, let for the purpose of a warehouse, and having no communication with the part of the dwelling-house occupied, but having a distinct external door, is not within the exemption; *ibid.* 105. Where the party assessed had not given the notice to the assessor requi-

As where they are only let for six months. The exemption in the 7 Geo. 3. of certain lands embanked on the river Thames does not extend to the house and window tax.

{ 3 }

A mandamus lies to compel commissioners to re-assess. The insertion of the collector's name, as such, in the warrant of the commissioners is not sufficient nomination? If there be in a parish two districts and two collectors, and one collector misapplies the whole parish is responsible.

### 2. SKINNER'S CASE. 1787. Ex. 8 Price, 124. n.

A. let houses furnished as lodging houses for part of the year, not at any time occupied for more than six months successively; he paid three quarters of a year's assessed taxes. The question was, whether he was liable to be charged for the latter quarter. The Court held that he was, though the houses had not been opened.

### 3. PENHARD V. HEYWARD. II. T. 1799. K. B. 8 T. R. 458.

The 7 Geo. 3. exempts the owners of certain lands embanked from the river Thames from all taxes and assessments whatever. The Court held, that it did not exempt the occupiers of houses built on such lands from the payment of the house and window duties imposed by the 38 Geo. 3. c.

(B) ON LAND. See *ante*, tit. Land Tax, vol. xii.

(C) ON PROPERTY. See *ante*, tit. Property Tax.

## II. RELATIVE TO THE OFFICERS CONNECTED WITH.

### (A) OF COMMISSIONERS.

#### IN RE WOOTTON. T. T. 1818. Ex. 6 Price, 105.

The acting commissioners of tax refused (unless indemnified) to proceed to make a re-assessment on a parish to which the deficiency applied. An *insuper* having been set on a parish, the Court ordered them so to do by a rule to show cause in the nature of a *mandamus*, and also ruled that a service on their clerk should be deemed sufficient.

### (B) OF COLLECTORS.

#### 1. REX V. RADLEY. T. T. 1801. Ex. Forrest. 150.

The question was, whether the insertion of the name of a person as collector of the assessed taxes in the warrant of the commissioners was a sufficient appointment to that office. The Court held that it was not.

#### 2. EX PARTE HENLLAN. T. T. 1819. Ex. 7 Price, 594.

Two collectors of taxes were appointed under the 43 Geo. 3. c. 99. for a single parish by the commissioners; one for one division of the parish, called the upper parish; and another for the division called the lower parish; and they accordingly collected the taxes separately for their several divisions; one of the tax gatherers having made default; the Court held that the whole parish were liable, and not the particular district alone to which he belonged.

red by the 43 Geo. 3. c. 161: held that the commissioners had no authority in their discretion to discharge the assessment, the surveyor having only the means of demanding a case for the opinion of the judges, upon a determination of an appeal. *Semble*, houses left unoccupied during part of the year are liable to the duties for the whole year, where the furniture is not taken away: *in re Cloyton*, 8 Price, 117.

\* The commissioners executing the several acts relating to the assessed taxes for districts are not entitled under the 43 Geo. 3. c. 161, (empowering them to discharge assessments at their discretion) to exonerate persons charged for taxes under the 10th section, on the ground of their not having been occupied during the whole year, unless notice in writing has been given to the assessor of such houses not having been occupied; *in re Cloyton*, 8 Price, 117. And if the commissioners should insert any such allowance in their schedule of discharge (as in that case the opinion of the judges cannot be taken, because that can only be done in a case of appeal), the Court will order them to amend the schedule by striking it out; *ibid*. So the commissioners are ordered to state and sign a case for the appellants, for the opinion of a judge, where a question arose respecting certain cases of duty made by a surveyor on the appellants; *in re Yarmouth*, 9 Price, 149.

† The 23 Geo. 3. c. 90, for paving and lighting the parish of St. Martin's, which prohibits, under a penalty, any person during the time he shall be collector of a tax, or hold any office of profit, or be interested in any contract or work to be done in the execution of that act, from acting as committee-man under the act, does not extend to a collector of assessed taxes; *Lee v. Barrell*, 1 M. and S. 452. The exemption from parish offices by a certificate under 10 & 11 W. 3. extends to a collectorship of rates established by 22 Geo. 2; the former duty of a surveyor of highways being only transferred by the act to the person holding that appointment; *Rex v. Davies*, 1 Ld. Kenyon, 329.

‡ But in a previous case, where a constable-wick consisted of several hamlets, and two collectors of the duties of houses, &c. were appointed to each hamlet, and the collector or collectors of any one hamlet having failed to pay over the money collected: held that the



3. *PEPPER v. COOPER* E. T. 1819. K. B. 2 B. & A. 431.

A bond, after reciting the appointment of H. W. to be collector, under the 43 Geo. 3. c. 99. was conditioned for the due collection, by H. W. of the rates, &c. It appeared that there was only one surety. The Court nevertheless held it valid.

4. *REX v. DEANE* E. T. 1798. Ex. 2 Anst. 369.

In this case it was held that, where a collector of revenue gave a bond to the crown, the penalty is a security against all the expenses of process and execution against him.

5. *REX v. JONES* H. T. 1820. Ex. 8 Price, 108.

The local commissioners of taxes, upon a representation by the collector of a deficit of a specific sum in his accounts (which turned out to be false) issued their warrant under the 43 Geo. 3. c. 99. for seizing his real and personal estates in his Majesty's hands; and subsequently extents issued for the same sum, under which, by an arrangement between the crown solicitor and the assignees of the collector (a bankrupt,) the estates were sold and the amount suspended (but not revoked) enlarging the rule with a view in a more advantageous sale. Upon the application of the assignees, after the lapse of some time, and an overruling application to the Treasury that the property might not be charged with the amount stated in the warrant, the Court held, that the crown might resort to both securities; that the inquisition finding the property subject to the warrant had the same effect as if found to be subject to a mortgage and saving the claim.

9. *UMPHREY v. McLEAN* M. T. 1817. K. B. 1 B. & A. 42.

*Assumpsit* for money had and received, brought to recover the amount of an excessive charge made by the defendants as collectors on a distress for arrears of taxes. Held that the defendants were not entitled to a month's notice before action brought under the stat. 43 Geo. 3. c. 99. s. 70. which provides that no writ or process shall be sued out for any thing done in pursuance of that act, till after one month's notice.

(C) OF ACTIONS AGAINST. See *ante*, tit. Revenue.

[ 4 ]  
The collector's bond is valid, though only one surety.

And such bond covers the expense of process, &c. against him.

And on the collector's bankruptcy the crown may seize all his property by warrant under the 49 Geo. 3 and also under an extent.

Collectors in an action for an excessive charge are not entitled to a month's notice.†

[ 5 ]

### III. RELATIVE TO COVENANTS TO PAY TAXES. See *ante*, tit. Covenant.

#### IV. RELATIVE TO LEVYING ARREARS.

1. *PATCHET v. BANCROFT* T. T. 1797. K. B. 7 T. R. 367.

In this case a question arose whether one warrant of distress for the amount of several duties imposed by different acts of parliament, each giving a power of distress, was legal. The Court were of opinion that it was.

particular hamlet where the collector or collectors have failed was liable to a reassessment under the 20 Geo. 3 and not the whole constablewick; *Burr v. Digby*, 1 N. R. 281. But a joint collector is liable for any deficiency of his coadjutor in the collection for the year; in *re Moorly*, 5 Price, 5. So, in another case, it was held that, if a collector of assessed taxes does not pay over all sums collected by him, the parish is answerable to the crown for the deficiency; *Rex v. St. George's, Hanover Square*, 3 Anst. 920.

\* The office of collector is an annual office, and the bond is satisfied by a due performance of the duty for one year; for, being taken under the act, the liability can only be co-extensive with the duty imposed by the act; *Pepper v. Cooper*, 2 B. & A. 431. So, the bond may be put in suit against the surety, although it may happen that another person may have been jointly appointed collector, without first sealing the bond, &c. against the person; *ibid*.

† But a collector of taxes exacting duty, in respect of which there has been no charge at all in the assessment upon the person from whom the payment was exacted, is not liable to the penalties under the 43 Geo. 3. c. 99; *Lister, qui tam, v. Priestley*, Weightw. 405. A collector of taxes in custody under an extent is not entitled to be discharged, although his deficiency has been made good to the crown by a re-assessment upon the parish; *Rox v. Bennett*, Weightw. 1. The insertion of a name of a person as collector for the assessed taxes, in the warrants of the commissioners, is not a sufficient appointment to that office; *Rox v. Radley*, Forest. 150. In *qui tam* action against a collector of taxes, it is not necessary to give in evidence his warrant; proof that he has acted as collector is sufficient; *Lister, qui tam, v. Priestley*, Weightw. 67.

‡ A preliminary assessment is necessary to levy for years passed, where the power is to

Separate and distinct arrears may be included in the same warrant. ‡

## S. SHAFTEBURY v. RUSSELL. E. T. 1823. K. B. 1 B. &amp; C. 666.

In levying arrears, the goods of the person charged can only be distrained. Goods were devised to trustees to be held and enjoyed by the persons who for the time being would be entitled to enjoy the mansion-house of the testator; and, after his decease, his son being in possession thereof, the goods were seized as a distress under warrant from the commissioners for arrears of the assessed taxes due from the son. Held that, not being the goods of the person charged, he having the use of them only in a particular prescribed way, there was no authority under the 48 Geo. 3. c. 99. s. 33. to distrain those goods; and also if the party had been a trader, the goods under the circumstances of the case would not, under the 21 J. 1. c. 19. have passed to his assignees with the consent of the true owner, the son having the use and possession, not by the consent of the trustees, but under the will.

The limitation to appeal is confined to the time prescribed by the commissioners under 25 Geo. 3.

## V. RELATIVE TO THE JURISDICTION ON QUESTIONS AS TO.\*

## REX v. WALKER. M. T. 1795. K. B. 6 T. R. 436.

The Court held that an appeal against a surcharge for the duties on servants, &c. must be preferred on the day appointed by the commissioners under 25 Geo. 3. c. 43. and cannot be made after the expiration of the year within and for which the tax is to be collected.

[ 6 ]

**Temple.** See *ante*, tit. *Sanctuary*.

**Tenancy.** See *ante*, tit. *Lundlord and Tenant*.

**Tenant in Chief.** See *ante*, tit. *Copyhold*.

**Tenant in Common.** See *ante*, tits. *Devise, Distress, Ejectment; Replevin; post*, tits. *Trespas, Trover, Waste*.

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VI. ESTATES IN COMMON, BEING SUBJECT TO DOWER, OR COURTESY. See *ante*, tits. *Courtesy, DOWER*.VII. PARTITION OF ESTATES IN COMMON. See *ante*, tit. *Partition*.

## I. RELATIVE TO THE DEFINITION OF.†

assess yearly; *Newton v. Young*, 1 N. R. 187. It was doubted whether a reassessment could be made for the duties on carriages, servants, and horses; *Rex v. Wimbleton*, 2 Anst. 855.

\* The Court of Exchequer will not, upon motion, enter upon any question of rateability to the assessed taxes; *Rex v. Navy, Commissioners of*, 3 Anst. 850.

† A tenancy in common is where two or more persons hold lands or tenements in fee simple, fee tail, or for term of life or years, by several titles not by a joint title, and occupy the same lands or tenements in common; from which circumstance they are called tenants in common, and their estate a tenancy in common. The only unity required between tenants in common is that of possession: for one tenant in common may hold his part in fee simple, the other in tail, or for life, so that there is no unity of interest. One may hold by descent, the other by purchase; or the one by purchase from one person, and the other by purchase from another, so that there is no unity of title. One's estate may have been vested fifty years, the other but yesterday, so that there is no unity of time.

## II. RELATIVE TO THE MODE OF CREATING, AND GENERAL INCIDENTS TO.\*

## III. OF THE RIGHTS AND LIABILITIES IN RELATION TO EACH OTHER.† [ 7 ]

## 1. MORTYN V. KNOWLYS. H. T. 1799. K. B. 8 T. R. 145.

In an action in the nature of waste, it appeared that the plaintiff and defendant were tenants in common of lands, on which were several trees growing; that the defendant occupied the whole, having a demise of the plaintiff of his moiety; and that he had felled many trees, all of which were of a proper age to be cut down. For the defendant, it was objected that, under these circumstances, this action for misfeasance could not be supported, for that the case must be considered in the same light as if the plaintiff had not leased his moiety to the defendant, the trees, as part of the inheritance, not passing by that lease; and, if so, that one tenant in common could not bring such an action against another, unless for some injury done to the inheritance; which was not pretended here, as all the trees were proper for being cut; that if the defendant could not cut trees in this state, one obstinate tenant in common might prevent the others from taking the produce of the land. For the plaintiff it was contended that the defendant ceased to be tenant in common during the lease, and became liable to the plaintiff like any other lessee; that, even if no lease had been granted by the plaintiff to the defendant, the former might maintain his action on the authority of *Moor*, 71, Pl. 194, and *Waterman v. Soper*, 1 *Ld. Raym.* 737.

One tenant in common cannot maintain an action against his co-tenant in possession of the whole property, under a demise of his companion's moiety for cutting trees of a proper age and growth.

The Court ordered a verdict to be entered for the defendant, observing that the plaintiff in another form of action would be entitled to recover a modus of the value of the trees that were cut.

\* Tenancy in common may be created either by the destruction of estates in joint tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates is meant such destruction as does not sever the unity of possession, but only the unity of title or interest; as, if one of two joint tenants in fee aliens his estate for the life of the alienee, the alienee and the other joint tenant are tenants in common, for they have now several titles; the joint tenant by the original grant, the alienee by the new alienation, and they have also several interests; the former joint tenant in fee simple, the alienee for his own life only. If one of two parceners aliene, the alienee and the remaining parceners are tenants in common, because they hold by different titles, the parceners by descent, the alienee by purchase; in short, whenever an estate in joint tenancy or coparcenary is dissolved, so that there be no partition made, but if the unity or possession continues, it is turned into a tenancy in common. A tenancy in common may also be created by express limitation in a deed; but here, care must be taken not to insert words which imply a joint estate; and then, if the lands be given to two or more, and it be not joint tenancy, it must be a tenancy in common; and the nicety in wording of grants makes it the most usual as well as the safest way, when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A. and B., to hold as tenants in common, and not as joint tenants. As to the incidents attending a tenancy in common: tenants in common (like joint tenants) are compellable by the statutes of Henry VIII. and William III. before mentioned, to make partition of their lands, which they were not at common law. They properly take by distinct moieties, and have no entirety of interest, and therefore there is no survivorship between tenants in common. The other incidents are such as merely arise from the unity of possession, and are therefore the same as appertain to joint tenants, merely upon that account, such as being liable to reciprocal actions of waste and of account by the stat. of Westm. 2, c. 22, and 4 Ann. c. 16.

† One tenant in common may have a writ of waste against another who has committed waste in the lands held in common, *St. Westm.* 2. c. 22; and the same of joint tenants; 2 *Inst.* 403; *Co. Lit.* 200. b. So, one joint tenant, or tenant in common, or his executor, &c., may have an action of account against the other as bailiffs, for receiving more than their portion of the profits of the estate; 4 & 5 Ann. c. 16; *Co. Lit.* 172, a. 186. a. 200. b.; 3 *Leon.* 228; *F. N. B.* 118. So, one joint tenant, or tenant in common, may maintain ejectment or other action against the others, if they eject him or withhold the possession from him, *Co. Lit.* 199. b.; but it must be an actual disseisin, such as turning him out, hindering him to enter, &c.; a bare perception of the profits is not sufficient; 1 *Salk.* 392; 7 *Mod.* 39; 1 *East.* 563; 2 *Harr.* 1-95. In trespass against B., C., and D., for turning A. out of his house, and keeping the house and goods from him, it was holden so

[ 8 ] 2. *DOE v. PROSSER*. M.T. 1774. K. B. Cowp. 217; *semb.* over-ruling *FARRINCLAIN v. SHOCKLETON*. 5 Burr. 2604.

Thirty-six years uninterrupted possession by one tenant in common is sufficient ground for a jury to presume an actual ouster of the co-tenant.\*

Upon a rule to show cause why a new trial should not be granted, Lord Mansfield reported that from the year 1434 one tenant in common had been in the sole possession of the lands without any claim or demand by any person or persons claiming under the other tenant in common; that no actual ouster was proved; but, upon the circumstance, he had left it to the jury to say whether there was not sufficient evidence before them to presume an actual ouster; and, supposing there was an actual ouster, in that case the lessors of the plaintiff were barred; the jury found there was sufficient evidence to presume an actual ouster. After the case had been argued,

Lord Mansfield said: It is very true that I told the jury that they were warranted by the length of time in this case to presume an adverse possession and ouster by one of the tenants in common of his companion; and I am still of the same opinion. Some ambiguity seems to have arisen from the term "actual ouster," as if it meant some act accompanied with real force, and as if a turning out by the shoulders was necessary; but that is not so; a man may come in by rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster; for instance, length of possession during a particular estate, as a term for 1,000 years under a lease for lives as long as the lives are in being, gives no title; but if the tenant *pour autre vie* hold over for twenty years after the death of *cestui que vie*, such holding over will in ejectment be a complete bar to the remainder-man or reversioner, because it was adverse to his title. So, in the case of common *eo nomine*, as tenant in common can never bar his companion, because such possession is not adverse to the right of his companion, but in support of their common title, and by paying him his share, he acknowledges him to be co-tenant; nor, indeed, is a refusal to pay of itself sufficient without denying his title; but if, upon demand by the co-tenant of his moiety, the other refuses to pay, and denies his title, saying, he claims the whole, and will not pay, and continues in possession, such possession is adverse and ouster enough; the question then is, whether the

[ 9 ]

be no plea to say that A. had nothing in the said house and goods; but jointly and undividedly with D.; 2 New. Rep. 188. But for a mere entry upon the premises without an ouster, no action of trespass will lie; Lit. 323; Th. Digl. 11. c. 30, 6; 1 Salk. 4; Skin. 6. And also where there are two joint tenants, or tenants in common of a personal chattel; such as a horse, or hawk, &c., and one of them seizes it for his own use solely, the other has no remedy by action; Lit. 333; Co. Lit. 300, a.; 1 T. R. 651. Therefore if one of two partners become bankrupt, his assignees cannot maintain trover against the solvent partner or his executor for any of the partnership goods. 1 East, 363; nor against any other person to whom the solvent partner may have given or delivered them, 1 East, 368; because in these cases the solvent partner, his executor, and the person to whom he delivered the goods respectively, were, as to these goods, tenants in common with the assignees of the bankrupt. But if a joint tenant, or tenant in common, destroy the goods, &c., as, if there be two tenants in common of a park or dove house, and one of them destroy all the deer, or take all the old doves and destroy the flight, the other may undoubtedly maintain trespass against him; Co. Lit. 200, a. b. And where one tenant in common of a ship took it away and sent it to the West Indies, where it was lost in a storm, this was holden to be evidence of a destruction, and the other tenant in common recovered against him in an action for his moiety; Pull. N P. 34, 35. So, one joint tenant or tenant in common may maintain trespass for mensse profits against the other after a recovery in ejectment, 3 Wils. 118; for, although not with the words, it is within the equity of the stat. 4 & 5 Ann. c. 16, above mentioned. So, if a husband and his wife and A. be tenants in common, and the husband and his wife sue dower against the heir before partition, it is no plea that he is tenant in common with A. and the defendant; R. 8 Lev. 84. So, when two are seized of a house or mill as tenants in common or joint tenants, and one be willing to repair it, he may have a writ *de domo reparando* against the other; Co. Lit. 200. h. As to the joinder of joint tenants and tenants in common in actions by them against strangers; see *post*.

\* But in *Pencoble v. Read*, 1 East. 568, it was determined that where a tenant in common levied a fine of the whole estate, and took the rent and profits afterwards without consent, for nearly five years, this was no evidence wherein a jury should be directed by the judge of the court to find an ouster of the co-tenant at the time of the fine levied.

possession in this case, after the particular estate ended; was a possession as tenant in common *eo nomine*, or adverse; it is a possession of near forty years which is more than quadruple the time given by the statute for tenants in common to bring their action of account, if they think proper, namely, six years. But in this case no evidence whatsoever appears of any account demanded, or of payment of rents, profits, or any claim by the lessors of the plaintiff, or any acknowledgment of the title of them, or in those under whom they would now set up a right; therefore I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing. The other judges concurred, and the rule for a new trial was discharged.

3. WATERMAN V. SOPER. 1697. N. P. 1 Ld. Raym. 797.

Holt, C. J. If A. plants a tree upon the extremest limits of his land, and the tree growing extends its roots into the land of B. next adjoining, A. and B. are tenants in common of this tree; but if all the roots grow in the land of A. though the boughs overshadow the land of B., yet the branches follow the roots, and the property of the whole is in A. So, if there be two tenants in common of a tree, and one cuts the whole tree, though the other cannot have an action for the tree; yet he may have an action for the special damage by his cutting, as when one tenant in common destroys the whole flight of pigeons. *See post*, tit. Trees.

If a tree spreads its roots into another soil they are tenants in common of the tree, and he may have an action against the other for the damage.

#### N. RELATIVE TO THE RIGHTS AND LIABILITIES OF, IN RELATION TO THIRD PERSONS; AND OF ACTIONS BY AND AGAINST THEM.\*

\* Tenants in common shall not join in a real action, for they have several titles, Lit. 311; nor in a writ of entry, upon stat. R. 2; or upon stat. 8 H. 6; Th. D. l. 2. c. 3. 8; nor in a writ of waste upon a lease for life; nor for forging of false deeds, for that concerns the inheritance; 2 Cro. 231. So, if they make a joint lease in tail or for life, rendering rent, which is not entire but may be divided, they shall make several avowries for several titles; Lit. 314; 5 T. R. 249. So, they shall not join in an avowry for rent, not entire, reserved upon a lease for years, Lit. 317; or, if a distress for rent, not entire, be rescued, they shall not join in rescous; Lit. 314. But in a real or mixed action for a thing entire and incapable of division tenants in common must join, as in assize for the service of horse, Co. Lit. 197; or in *quare impedit*, the present action being entire, Co. Lit. 197. b; Th. D. l. 2. c. 3. s. 3; or in waste upon lease for years, 2 Mod. 61; or in writ of ravishment, or right of ward, C. Lit. 197. b; Th. D. l. 2. c. 5. So, in all personal actions for a matter that concerns the tenements in common (and where the injury complained of is entire and indivisible), tenants in common must join, as in trespass *quare clausum fregit*, D. 1 Sid. 49; Th. D. l. 2. c. 3; 4 Co. Lit. 198; 1 Salk. 4; R. 5 H. 4, l. b; or in an action on the case for a nuisance, &c., 2 Cro. 231; or in detinue of charters, Co. Lit. 197. b; Th. D. l. 2. c. 6; or in a *warrantia chartæ*, Co. Lit. 197. b; or in action on the case for ploughing their lands, whereby their cattle are hurt, R. Jon. 142; Com. Dig. Abatement. E. 10, or the like. Tenants in common, however, may join or sever in debt or covenant for rent, Carth. 289, they may join, because the contract is entire, or they may sever, because the rent is distributable. So one tenant in common may sue for the double value of his moiety of the rent, under stat. 4 G. 2. c. 28; 2 W. Bl. 1077; or both may join in an action for the double value of the whole rent. But in all other cases where that which is sued for is not distributable, as in covenant for not repairing where the damages are not distributable, because uncertain, tenants in common must join in the action; 1 Sid. 157; 1 Lev. 109; T. R. ym. 86; and see Bro. Joinder in Action, 104; 28 Ed. 3, 90; 18 H. 6. c. 7; Keilw. 14; Moor, 40; Bendl. 89; Godh. 90. 283. It has been decided that tenants in common cannot recover in ejectment on a joint demise, 1 Show. 342; 2 Vent. 214; Comb. 190; Carth. 224; Co. Lit. 200; 2 Wils. 232; not, it should seem, for the reason usually assigned for it, namely that tenants in common cannot join in a lease, for they may join or sever in making leases at their option, Co. Lit. 168; 1 Roll. Abr. 849. 877; 3 Bac. Abr. Joint Tenants, H. 1; but because of the inconvenience of trying two titles in the one action, as tenants in common claim by distinct titles.

If one tenant in common be sued alone in a personal action without his co-tenant, for a matter touching the lands holden in common, he may plead in abatement that he held in common with such a person not named, 7 H. 58. 6; Bro Action sur le Case. 32; Joint Tenancie, 12 Clift. Ent. 7. Pl. 161. d; 23 H. 60; Lib. Plac. 2. Pl. 11; 5 T. R. 651; as in a writ *de rationabili parte*, Th. D. l. 11, c. 30. 1; in trespass *quare clausum fregit, et herbam et bladum consumpsit*, &c.; Lit. 323. But if a husband and wife and A.

TENANT, JOINT — *Definition of.*

- [ 10 ] **Tenant by Copy of Court Roll.** See *ante*, tit. *Copyhold*.  
**Tenant by Courtesy.** See *ante*, tit. *Dower*.  
**Tenant in Dower.** See tit. *Dower*.  
**Tenant in Fee.** See tit. *Fee*, and *Fee simple*.
- [ 11 ] **Tenant, Joint.** See also *ante*, tits. *Devise*; *Distress*; *Ejectment*; *Replevin*; *post*, tit. *Trespass*; *Trover*; *Waste*.
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  - III. RIGHTS AND LIABILITIES OF, IN RELATION TO EACH OTHER, AND ACTIONS BY AND AGAINST. See *ante*, p. 9. n.
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  - V. LEASES BY, p. 13.
  - VI. ESTATES IN JOINT TENANCY, BEING SUBJECT TO DOWER OR COURTESY. See *ante*, tits. *Courtesy*; *Dower*.
  - VII. THE PARTITION OF ESTATES IN JOINT TENANCY. See *ante*, tit. *Partition*.

I. RELATIVE TO THE DEFINITION OF.\*II. RELATIVE TO THE MODE OF CREATING, AND GENERAL INCIDENTS TO.†

be tenants in common, and the husband die and the wife bring dower against the heir before partition, it is no plea that the heir is tenant in common with A. and the defendant; R. 3 Lev. 84. Also in replevin, tenants in common must avow severally for rent, 1 Salk. 890; 1 Jon. 258; but jointly for damage feasant; R. 1 Jon. 253; Com. Dig. Abatement, F. 6. If a lease for years be made to B. and C. rendering rent, and B. assign his moiety to D., if afterwards the rent be in arrear, the lesser may bring an action of debt for it against B. and D. jointly, for the reversion remains entire; Palm. 383. Also, if tenants in common refuse to set out their tithes, the action must be brought against them both; but if one alone occupy the land, the action must be brought against him only; or if one set out the tithes, and the other take them away, the action must be brought against the wrongdoer; Hut. 121; Cro. Jac. 86. 362.

\* An estate in joint tenancy is, where lands or tenements are granted to two or more persons, to hold in fee simple for life, for years, or at will. In consequence of such grants the estate is called an estate in joint tenancy.

† The creation of an estate in joint tenancy depends on the wording of the deed or devise by which the tenants claim title; for this estate can only arise by conveyance or grant, that is, by the act of the parties, and never by the mere act of the law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A. and B. and their heirs, this makes immediately joint tenants in fee of the lands. The properties of a joint estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession; or in other words joint tenants have one and the same interest accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession. Joint tenants are said to be seized *per my et per tout*, by the half or moiety, and by all; that is, they each of them have the entire possession as well of every parcel as of the whole. They have not one of them a seisin of one half or moiety, and the other of the other moiety; neither can one be exclusively seized of one acre and his companion of another, but each has an undivided moiety of the whole and not the whole of an undivided moiety; and, therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seized of the entire *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. Upon these principles of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint tenant's estate. If two joint tenants let a verbal

#### IV. RELATIVE TO THE RIGHTS AND LIABILITIES OF, IN RELATION TO THIRD PERSONS, AND ACTIONS BY AND AGAINST.\*

lease of their lands, reserving rent to be paid to one of them, it shall enure to both, in respect of the joint reversion. If their lessee surrenders his lease to one of them, it shall also enure to both, because of the privity or relation of their estate. For the same reason livery of seisin made to one joint tenant shall enure to both of them, and the entry or re-entry of one joint tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint estate, one joint tenant cannot sue or be sued without joining the other. But if two or more joint tenants be seized of an advowson, and they present different clerks, the bishop may refuse to admit either, because neither joint tenant has a several right of patronage, but each is seized of the whole, and if they do not both agree within six months, the right of presentation shall lapse. Upon the same ground it is held, that one joint tenant cannot have an action against another for trespass in respect of his land, for each has an equal right to enter on any part of it. But one joint tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds; and if any waste be done which tends to the destruction of the inheritance, one joint tenant may have an action of waste against the other, by construction of the stat. Westm. 2. c. 22. So, too, by the stat. 4 Ann. c. 16. joint tenants may have actions of account against each other for receiving more than their due share of the profits of the tenants, held in joint tenancy.

From the same principle also arises the remaining grand incident of joint estates; viz, the doctrine of survivorship; by which, when two or more persons are seized of a joint estate of inheritance, for their own lives, or *per auter vie*, or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor, and he shall be entitled to the whole, whatever it be, whether an inheritance on common freehold only, or even a less estate. We are, lastly, to inquire how an estate in joint tenancy may be severed and destroyed. And this may be done by destroying any of its constituted unities. 1. That of time, which respects only the original commencement of the joint estate, cannot indeed (being now part) be affected by any subsequent transactions. 2. But the joint tenant's estate may be destroyed without any alienation by merely dissuicing their possession. By common law one of them could not compel the other so to do. But now by the stats. 31 Hen. 7. c. 1. and 32 Hen. 7. c. 32. joint tenants, either of inheritances, are compellable by writ of partition to divide their lands. 3. The jointure may be destroyed by destroying the unity of title; as if one joint tenant aliens and conveys his estate to a third person; here the joint tenancy is severed and turned into tenancy in common for the grantee, and the remaining joint tenant, the other from the subsequent grantor; though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure; for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original erection of the estate, and has therefore a priority to the other) is already vested. 4. It may be also destroyed by destroying the unity of interest. And therefore, if there be two joint tenants for life, and the inheritance is purchased by, or descends upon either, it is a severance of the jointure; though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure without merging in the inheritance; because being created by one and the same conveyance, they are not separate estates (which, in order to a merger,) but branches of one entire estate. And by whatever means the jointure ceases, or is severed, the right of survivorship, or *jus accrescendi*, the same instant ceases with it.

If a joint tenant be sued alone, he may plead that he holds jointly with such a one who is alive and not named; Co. Lit. 189. b.; as in a writ of right of advowson or darrein presentment; 14 H. 4. c. 12; 19 H. 6. 33; in a *præcipe quod reddat*; Th. D. l. 11. c. 28. 23. 50; in a writ of entry; Th. D. l. 11. c. 28; in a *formedon*; 48 Edw. 3. c. 62; Leon. 161; Dalt. 75; Th. D. l. 11. c. 28, 36; in a *per quæ servitiæ*; 8 Edw. 3. c. 97; Th. D. l. 11. c. 28. s. 28; in a writ of deceit upon a recovery; Th. D. l. 11. c. 23. 17; in a writ of right of ward; Th. D. l. 11. c. 28, 42. 32, 37; 49 Edw.

\* Joint tenants must join in all real and mixed actions, for they have but one joint title, and one freehold; Co. Lit. 189. a 195. b.; and therefore they ought to join in a writ, *præcipe quod reddat assize waste quare impedit*, &c. Th. D. C. 2. c. 2; and in ejectment the declaration must be upon their joint demise. So they ought to join, although one only have cause of complaint; as in *assize*, where a tort is done by the lessee for years, of one which ousts the other joint tenant; Th. D. C. 2. c. 2. 16. So, they ought to join in trespass, and other personal actions, where they have a joint interest; so, in debt or avowry for rent, R. 5 Mod. 73; or avowry for damage feasant, 5 Mod. 151. But they are not to join in *audita querela*; where execution issued against them on a joint recognizance, for it is a several grievance; R. Noy; 1; Com. Dig. Abatement, E. 9.

[ 13 ]

## V. RELATIVE TO LEASES BY.\*

3. 27; in a *juris utrum*, stat. 2 Ed. 3. 57; Th. D. l. 11. c. 28. 5; in an assize of land, Th. D. l. 11. c. 28. 11; in a *cessavit*, 2 Ed. 3. 110. 47; Th. D. l. 11. c. 28. 10; in waste against guardian, Th. D. l. 11. c. 28. 38; in dower, Th. D. l. 11. c. 28; and in dower, against a guardian joint tenancy in the ward, by deed, may be pleaded; 9 H. 5. 41; Th. D. l. 11. c. 28. 45. So, a man may plead joint tenancy with his wife, Th. D. l. 11. c. 28. s. 10. 12; though the wife die pending the writ; for the death does not make a bad writ good; Th. l. 11. c. 28. 31. So, he may plead joint tenancy with one who is named in the render of a fine, though he never had any thing in possession; 8 H. 4. Com. Dig. Abatement, F. 5. Also, one joint tenant cannot avow alone for rent, 5 Mod. 73; or for damage feasant; 5 Mod. 151. So, in all personal actions, relating to their joint property, they must be jointly sued. So, if joint tenants refuse to set out their tithes, the action must be brought against them jointly; but if one alone occupy the land, the action must be broken against him only, or if one of them set out the tithes, and the other take them away, the action must be brought against the wrong doer; Hat. 121; Cro, Jac. 56. 364.

\* Joint tenants, coparceners, and tenants in common, may either make leases of their undivided shares, or else may join in a lease of the whole to a stranger. One joint tenant, or tenant in common, may also make a lease of his part to his companion, for this only gives him the right of taking the whole profits when before he had but a right to the moiety of shares thereof, and he may contract with his companion for that purpose, as well as with a stranger. If there be two joint tenants, and they make a lease by parol, or deed poll, reserving rent to one only, it shall enure to both. Yet if the lease had been by deed indented, the reservation should have been good to him only to whom it was made, and the other should have taken nothing. The reason of the difference is this, where the lease is by deed, poll, or parol, the rent will follow the reversion, which is jointly in both lessors, and the rather because the rent being something in retribution for the land given to the joint tenant to whom it is reserved ought to be seized of it in the same manner as he was of the land demised, which was equally for the benefit of his companion and himself; but where the lease is by deed indented, they are estopped to claim the rent in any other manner than is reserved by the deed, because the indenture is the deed of each party, and no man shall be allowed to recede from, or vary his own solemn act. If one joint tenant does a thing which gives to another an estate or right in the land, it binds the survivor; as if a joint tenant in fee or for life makes a lease for forty years. Therefore, if two joint tenants are in fees, and one lets his moiety for years to begin after his death; this is good and shall bind the other if he survive, because this is a present disposition, and binds the lands from the time of the lease made, so that he cannot afterwards avoid it. So, if one joint tenant grant the vesture or herbage of the land for years, and dies, this shall bind the survivor; or if two joint tenants are possessed of a water, and one grants a separate piscary for years, and dies, this shall bind the survivor, because in these cases the grant of the one joint tenant gives an immediate interest in the thing itself, whereof they are joint tenants. If there are two joint tenants for life, and one of them makes a lease for years of his moiety, either to begin presently or after his death, and dies, this lease is good and binding against the survivor, the reason whereof is that notwithstanding the lease for years, the joint tenancy in the freehold still continues, and in that they have a mutual interest in each other's life, so that the estate in the whole, or any part is not to determine or revert to the lessor till both are dead. for the life of one as well as the other was at first made the measure of the estate granted out by the lessor, and therefore so long as either of them lives, if the joint tenancy continues, he is not to come into possession. Now these joint tenants having a reciprocal interest in each other's life, when one of them makes a lease for years of his moiety, this does not depend on its continuance for his life only, but on his life and the life of the other joint tenant, whichever of them shall live longest, according to the nature and continuance of the estate whereout it was derived, and then so long as that continues so long the lease holds good; and, by consequence, such lessee shall hold out the surviving joint tenant and the reversioner, till the estate whereout this lease was derived be fully determined. But if a rent were reserved on such lease, this is determined and gone by the death of the lessor, for the survivor cannot have it because he comes in by title paramount to the lease, and the heirs of the lessor have no title to it, because they have no reversion or interest in the land, but the executors or administrators of tenant for life shall, on his death, recover of the lessee a rateable proportion of the rent from the last day of payment to the death of such lessor. A. and B. being joint tenants for life, a lease made by A. of the one moiety, to have and to hold after the death of B. for sixty years, if A. so long live, and of the other moiety to have and to hold after the death of A. for sixty years, if B. so long live, and A. dies, B. surviving, it is bad for both parties; for the first words of it was a good lease from A. of his part upon the contingency of his surviving B., but that never happened and as to B.'s part, it had no power to lease or contract for it during the life of B. though it had happened after to survive him, for it was but a bare possibility, which could not be leased or contracted for, and therefore the lease was void in the whole.



## TENANT BY STATUTE.

11

**Tenant for Life.** See *ante*, tit. *Life*, *Tenant for*.

[ 14 ]

**Tenant to the Praeſcipe.** See *ante*, tit. *Recovery*.

**Tenant after Poſſibility of Issue extinct.\***

[ 15 ]

**Tenant by Statute.†**

So, if one joint tenant make a lease for years, if he and his companion live so long; and after surrender his moiety, and take back another estate, the lease determines by the death of either of them; for it hath no continuance longer than the jointure continues which is severed by the surrender, a new estate being taken. If joint tenants join in a lease, this shall be but one lease, for they have but one freehold; but if tenants in common join in a lease, this shall be the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively, and that extends the passing of an estoppel, which is never admitted, if by any construction it can be avoided. In the case of joint lessees, if a lease be to A. and B. by indenture, and A. seals a counterpart, and B. agrees to the lease, but does not seal, yet B. may be charged for a covenant broken, and this though the covenant be collateral, and not annexed to the land. The assignee of a term, however, is not liable on a mere collateral covenant; Cro. Jac. 439.

\* Is defined by Littleton to be, where tenements are given to a man and to his wife in especial tail; if one of them die without issue, the survivor is tenant in tail after possibility of issue extinct. As, if they have issue, and the one die, albeit that during the life of the issue, the survivor shall not be said tenant in tail after possibility of issue extinct; yet, if the issue die without issue, so as there be not any issue alive which may inherit by force of the entail, then the surviving party is tenant in tail after possibility of issue extinct. Nothing but a moral impossibility of having issue can give rise to this estate. Thus, if a person gives lands to a man and his wife, and to the heirs of their two bodies, and they live to a hundred years without having issue, yet they are tenants in tail, for the law sees no impossibility of their having issue; 1 Inst. 28. a. This estate, though strictly speaking not more than an estate for life, partakes in some circumstances of an estate tail. For a tenant in tail, after possibility of issue extinct, has eight qualities or privileges in common with a tenant in tail. 1st. He is punishable for waste, because he continues in by virtue of the livery upon the estate tail, and having once had the power of committing waste he shall not be deprived of it by the act of God. 2nd. He shall not be compelled to atorn. 3rd. He shall not have aid of the person in reversion, because he having originally the inheritance by the first gift, has likewise the custody of the writings which are necessary to defend it. 4th. Upon his alienation no writ of entry in consimili casu lies. 5th. After his death, no writ of intrusion lies. 6th. He may join the mise in a writ of right in a special manner. 7th. In a praecipe brought by him, he shall not name himself tenant for life. 8th. In a praecipe brought against him, he shall not be named barely tenant for life. There are, however, four qualities annexed to this estate, which prove it to be in fact only an estate for life; 1 Inst. 27. b.; 2 Inst. 302; 1 Roll. Rep. 184. 1st. If this tenant makes a feoffment in fee, it is a forfeiture, because having no longer a descendible estate in him he cannot transfer such an estate to another without the prejudice and disinheritance of the person in remainder. 2nd. If an estate in tail or in fee in the same lands descends upon him, the estate tail, after possibility of issue extinct is merged. 3rd. If he is impeached; and makes default, the person in reversion shall be received as upon default of any other tenant for life. 4th. An exchange between this tenant and a bare tenant for life is good, for, with respect to duration, their estates are equal; 1 Inst. 27. b.; 11 Rep. 80. b. The Court of Chancery, by analogy to the rule adopted in the case of tenant for life, without impeachment of waste, will restrain persons seized of estates tail after possibility of issue extinct from pulling down houses, cutting down trees planted for shelter or ornament, or any other kind of malicious waste; 2 Chm. Ca. 32; 2 Show. 68; 2 Freem. 53. The privilege which this tenant enjoys arises from the privacy of estate, and because the inheritance was once in him; therefore, if he grants over his estate to another, his grantee will be bare tenant for life; 2 Inst. 28. a.; 3 Leon. 241.

† Estates by statute merchant, statute staple, and elegit, are measured by the satisfaction of a debt; but as the tenancy does not commence until an extent (i. e. valuation) of the tenements has been made by the proper authority, these estates seem to have all the certainty of continuance which is necessary to constitute a term of years. And accordingly, although the statutes to which they owe their origin speak of the seisin of the creditor, and provide that, if dispossessed, he shall have his remedy by assize, yet it has been always held that such interests have the similitude only, and not the nature of freehold. The statute merchant (for so the instrument itself is called, the form of which is prescribed by stat. 11 Edw. 1. amended by 13 Edw. 1. stat. 3.), the statute staple (according to 27 Edw. 3. stat. 2. c. 9.) and the recognizance in the nature of a statute staple (under stat. 23 Hen. 8. c. 6.) all agree in this, that they are recorded acknowledgments of a debt which not being paid by a certain day, the sheriff is authorized to deliver the lands as well as goods of the debtor to the creditor by a reasonable extent, to hold them until such time as the debt is wholly loved. And the liability extends to all the lands which the debtor had at the time of acknowledging the statute or recognizance, though he should afterwards sell or other-

[ 16 ] **Tenant by Sufferance.** See tit. *Sufferance, Tenant by Tenant in Tail.*

- I. RELATIVE TO THE NATURE AND DIFFERENT KINDS OF, p. 16.
- II. HOW CREATED, AND WHAT MAY BE ENTAILED, p. 17.
- III. WHO MAY BE TENANTS IN, p. 17.
- IV. WHAT SUCH AN ESTATE IS SUBJECT TO, p. 17.
- V. THE RIGHTS AND POWERS OF THE TENANT IN TAIL, p. 18.
- VI. WHO ENTITLED TO THE CUSTODY OF THE TITLE DEEDS, p. 19.
- VII. THE PAYING OFF INCUMBRANCES, p. 19.

# I. REALTIVE TO THE NATURE AND DIFFERENT KINDS OF.\*

## [ 17 ] II. RELATIVE TO HOW CREATED, AND WHAT MAY BE ENTAILED.†

wise dispose of them, and to all which he may afterwards acquire; 2 Bac. Abr. 298; Co. Lit. 436. These statutes and recognizances are now wholly disused, in consequence of the introduction of tenants by elegit; see ante, tit. *Elegit*.

\* Before the statute of Westminster the Second, 13 Edw. 1. of which the first chapter is known as the statute *De Donis Conditionalibus*, if any one gave lands or tenements to another, and the heirs of his body, an estate was considered a fee simple, conditional, which could not be absolutely aliened until the performance of the implied condition; namely; that a child should be born to the donee; if there was no such child, or if after his birth no alienation was made, the property, upon failure of the donee's posterity, to whom only it was descendible, would revert to the donor or his heirs, who, if their title were disputed, were enabled in such cases to enforce their claims by means of a writ called *formedon*. By the statute just mentioned, it was enacted that the will of the giver, according to the form in the deed of gift manifestly expressed, should be observed, so that they to whom a tenement was so given under condition should not have power to alien the same tenement, whereby it should not remain after the death of the donees to their issue, or to the donor or his heir, if issue failed; and a writ of *formedon* was accordingly given to the issue to whom the estate ought to descend, which has since been distinguished as the *formedon* in the descender. Thus the rights of the donor and of the donee's possession was secured; and it is said that by the same statute the donor required an actual estate in reversion where he had before only a possibility of reverter; this could only be affected by the conversion of the conditional fee simple into a particular estate, which character it obtained under the new name of fee tail. Estates tail are either general or special. Tail general, is where only one persons body is specified from which the issue must be derived; as, where the gift is simply to A. and the heirs of his body. Tail special is, where both the original parents are marked at, as if it be to A. and the heirs of his body to be begotten upon B., or to B. and the heirs of her body, to be begotten by A.; or to A. and B. and the heirs of their bodies; in which last case, the parties are joint tenants of the inheritance. But if the gift had been to two persons either of the same sex, or by law absolutely incapable of intermarriage, and the heirs of their bodies, then they would have been joint tenants for life; so that the entirety would go to the survivor of his life, but tenants in common in remainder of the inheritance in tail general. Again, whether general or special, the estate tail may be made descendible to all the issue in their order, without distinction of sex, as in the preceding examples; or it may be continued to the heirs male, or, which is not very usual, to the heirs female. In the two latter cases, which are distinguished by the appellants of tail male and tail female, the descent must be traced entirely through males, or entirely through females; Co. Lit. 19; 5 Bac. Ab. 717.

† The statute *De Donis* speaks only of three modes of creating an estate tail: namely, by a gift to a man and his wife and to the heirs of their bodies; a gift in frank marriage and a gift to a person and the heirs of his body issuing; yet if lands be given to a person and his heirs, and if the donee dies without heirs of his body, that it shall remain to another, this shall be an estate tail by the equity of the statute, though it be out of the words, for the makers of the act did not mean to enumerate all the forms of estates tail, but to put these examples so as all manner of estates tail, general or special, are within the power of the act. For, as it is said by Hale, J., at common law, the interest of the donor was infringed and eluded, which was contrary to right and good conscience; therefore he statute

## III. RELATIVE TO WHO MAY BE TENANTS IN.\*

## IV. RELATIVE TO WHAT SUCH AN ESTATE IS SUBJECT TO.†

V. RELATIVE TO THE RIGHTS AND POWERS OF THE [ 18 ]  
TENANT IN TAIL‡.

being made to restrain that recent liberty of creating such interests, which was suffered by the common law, shall be extended by equity; Plowd. 53; 2 Inst. 334. With respect to the kind of property on which the statute De Donis was meant to operate, the only word in the statute is *tenementum*, which has been shown to signify every thing that may be holden, provided it be of a permanent nature, so that not only lands may be extended, but also every species of corporeal property; 2 Inst. 20. 7 Rep. 33. b.; 2 Ves. 170; 1 Bro. Rep. 377.

\* All natural persons capable of holding estates of inheritance in land may be tenants in tail. And it was solemnly determined in 4 Eliz. that the king was within the statute De Donis, as well as a common person; because the statute was made to remedy the error which had crept into the law, that the donee had the power of alienating an estate given to him, and the heirs of his body after issue had; and to restore the common law in this point to its right and just course, which it did, by restoring to the donor the observance of his intent. And when the statute De Donis ordained that the will of the donor should be observed, it made his will to be a law as well against the king as against another.

† Although estates tail are subject to the curtesy of the husband and the dower of the wife, which are incidents inseparably annexed to them, yet they are not subject to merger; see ante, tit. Merger.

‡ Since a tenant in tail has an estate of inheritance, he has a right to commit every kind of waste, by felling timber, pulling down houses, opening and working mines, &c.; but this power must be exercised during the life of the tenant in tail, for at the instant of his death it ceases. If, therefore, a tenant in tail sells trees growing on the land, the vendee must cut them down during the life of the vendor, otherwise they will not descend to the heir, as parcel of the inheritance. 11 Rep. 50. A.; Plowd. 259. A bond to restrain a tenant in tail from committing waste is void. Thus, where a person settled lands to his daughter and the heirs of her body, and took a bond from her not to commit waste, the bond was put in suit, but the Court held it to be an idle bond, and directed it to be delivered up to be cancelled; 2 Ves. 251. The statute De Donis does not peremptorily annul the alienations made by tenants in tail, but forbids that the issue be disinherited by them; nor does it determine in what manner the disinheritance shall be prevented with her, by giving a right of entry to the heir, or merely by reserving to him the right of action of *formedon*, in the descender, which is specified in the statute. On this subject the following distinctions were early established: That the feoffment, or fine of tenant in tail, of land in possession by virtue of the entail, caused a discontinuance of the entail, whereby the issue, and the persons in remainder and reversion, were put to their *formedons*; but that the grant of fine, which operates as a grant of tenant in tail of land in remainder, expectant upon estate of freehold, or of tenant in tail of an incorporeal tenement, whether in possession or remainder, had no such effect, but left a right of entry, or enjoyment, without action, to the persons who should be entitled under the entail. A discontinuance may be either in fee, or for a more limited period; its effect will remain while the estate created by the conveyance of the tenant in tail continues; and if he make a lease for the life of the lessee, this lease by virtue of the livery of seisin, and as creating an estate which may possibly extend beyond the life of the lessor, is a discontinuance during that estate, and therefore the lessor is no longer tenant in tail, but requires a new reversionary estate in fee simple. If now he grant this reversion to a third person, and he, by the death of the lessee in the life-time of the grantor, becomes seized of the land, the discontinuance is then extended to the whole fee simple, just as if the tenant in tail had originally made a feoffment in fee; but, without this seisin of the grantee in the life-time of the grantor, the mere alienation of the reversion does not enlarge the discontinuance. But a discontinuance made in the manner above mentioned, though it may be of limited duration, cannot, while it lasts, have a partial operation in respect of the persons whom it affects. If the estate tail be discontinued, so are all the remainders and the reversions; Cro. Car. 321; Co. Lit. 625. 626.

There may, however, be a discontinuance without feoffment or fine, by the obligation of a warranty descending on the person entitled under the entail. Thus, if a tenant in tail be disseised, and then release his right to the disseisor, with a clause of warranty against himself and his heirs, and afterwards die; now his eldest son is not allowed to enter into the land, but must bring his action of *formedon*, in order to give the disseisor an opportunity of pleading the warranty. It is plain that this is but a partial discontinuance, for it extends only to those persons on whom the obligation of the warranty descends, who will be the heirs general (according to the rule of descents in fee simple) for the time being of the person who made the warranty. The most effectual process by which the heirs and the persons in remainder and reversion may be all cut off at once, and the estate tail converted into a fee

## [ 19 ] VI. RELATIVE TO WHO ENTITLED TO THE CUSTODY OF THE TITLE DEEDS.\*

## VII. RELATIVE TO PAYING OFF INCUMBRANCES.†

simple, is a common recovery. The effect of a common recovery is to convert the estate tail on which it operates into a fee simple, as absolute as that out of which it was at first derived. The recovery must therefore defeat, not only the remainders and reversion which are expectant on the natural expiration of the estate tail, but also all shifting uses in executory devises to which, as destructive casualties, it was subjected in its creation; *Holmes v. Adstrie*, 1 Mudd. 551. It is laid down by Lord Hult, that if the donor reserve a rent, with a condition to re-enter, on non-payment, a recovery will not bar it, that being a condition that runs with the land, in contradistinction to a collateral condition, giving a right of re-entry for non-payment of a sum in gross. It would, perhaps, be difficult to find another instance of a condition so inherent to the land as not to be destroyed by the recovery of tenant in tail in possession, whose estate was created at the same time with the condition. A condition not to alien the estate, though not absolutely void, (for it converts what would otherwise be a discontinuance into a forfeiture,) is of no avail against a recovery, nor against a fine with proclamation.

For a fine levied by tenants in tail, whether in possession or remainder, is not without its effect. By the statute *De Donis*, indeed, such a fine is declared to be void; yet when applied to lands of which the conusor was actually seised in tail, it has always been held to be a discontinuance. Under the statute of 4 Hen. 7. it was considered doubtful whether the heirs to an entail were included in the denomination of privies to the fine of their ancestor. But this doubt was removed by stat. 32 Hen. 8. c. 36. which declares a fine levied with proclamations according to the former statute, by any person of full age, of lands or tenements before in anywise entailed to him or to any of his ancestors in possession, reversion, or remainder, to be a sufficient bar and discharge for ever against him and his heirs, claiming only by force of such entail. The effect of a fine upon the remainder and reversion is not altered by this statute. If, therefore, tenant in tail of an incorporeal tenement in possession or remainder, or of land in remainder, levy a fine, the ulterior estates in remainder or reversion are not affected; and hence the estate transferred is of a peculiar kind, being a fee simple, which will necessarily cease on the conusor's death without issue, inheritable according to the entail. On the other hand, if tenant in tail of land in possession levy a fine without the concurrence of the person in remainder or reversion, he at the same time bars his own heirs and discontinues the ulterior interests, which will also eventually be barred, unless recovered by a formedon brought within five years after the right of possession shall accrue. But whether the estate tail be in grant or in livery, if the immediate reversion or remainder in fee simple happen to be vested in the conusor himself, or in one of several conusors, or in the conusee, the determinable fee into which the estate tail is converted by the fine will be merged in the ulterior absolute fee; and thus, what was at first a reversion or remainder in remote expectancy will become an estate in possession. And here the difference between the operation of a fine and a recovery is very observable; for a recovery would have converted the estate tail into a fee simple, and destroyed the expectant estate, while a fine, on the contrary, destroys the estate tail, and gives the immediate enjoyment of the expectancy; and this difference is not merely theoretical; for, if the estates have been transmitted by descent, and incumbrance made by the ancestor, which upon his death must have dropped off from estate tail, would still adhere to the ulterior fee simple; and, together with it, would either be cut off by the recovery, or establish an immediate right by the fine.

Though an entail cannot be discontinued but by the person seised in tail under it; yet, if tenant in tail in possession convey the land to another by lease and release, and at the same time covenant with him to levy a fine, this fine being afterwards levied makes a discontinuance, for the lease and release and fine are all to this intent considered as one assurance, in which the fine has the principal operation. And it would seem that this operation is to be regarded as commencing from the execution of the prior conveyance; for it has been held, that where tenant in tail, having created a tenant to the prince for the purpose of suffering a recovery, made his will relating to the same lands, and then suffered the recovery,

\* Tenant in tail, having an estate of inheritance, has a right to all deeds and muniments belonging to the lands, which the Court of Chancery will order to be given to him; 2 P. Wms. 471.

† Tenant in tail having only a particular estate, and not the entire property, he is not bound to pay off any charges or incumbrances affecting the estate. But where a tenant in tail does pay off an incumbrance charged on the fee simple, the presumption is that such payment was made in exoneration of the estate; because he may, if he pleases, acquire the absolute ownership. But the tenant in tail may, by taking an assignment of the incumbrance to a trustee for himself, or by several other acts, charge the estate with the payment of such maintenance: 1 Mo. R. 206. It was formerly held that a tenant in tail was not even bound to pay the interest of any incumbrance charged on the estate; but it has been since resolved that in some cases he is bound to keep down the interest.

**Tenant at Will.** See *post*, tit. *Will, Tenant at*.

[ 20 ]

**Tenant for Years.** See *ante*, tit. *Lease*.

**Tenant from Year to Year.** See *ante*, tit. *Landlord and Tenant*.

**Tender.\***

[ 21 ]

I. **RELATIVE TO TENDER OF AMENDS IN ACTION AGAINST JUSTICES, &c.** See *ante*, tit. *Excise and Customs*; Justices, vol. xi. p. 767; and *post*, tit. *Trespass*.

II. **CONVEYANCE.** See *post*, tit. *Vendor and Purchaser*.

III. **MONEY.**

- (A) IN WHAT ACTIONS IT MAY BE MADE, p. 22.
- (B) AT WHAT TIME IT SHOULD BE MADE, p. 22.
- (C) EFFECT OF MAKING, p. 23.
- (D) TO WHOM IT SHOULD BE MADE, p. 24.
- (E) ON WHOSE BEHALF TO BE MADE, p. 25.
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- (G) IN WHAT MANNER IT SHOULD BE MADE IN GENERAL, p. 22.
- (H) OF PRODUCING THE MONEY, AND WHEN ITS PRODUCTION MAY BE DISPENSED WITH, p. 26.
- (I) — ITS BEING UNCONDITIONAL, p. 27.
- (J) — A SUBSEQUENT DEMAND AND REFUSAL OF THE SUM TENDERED, p. 28.
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- (M) — THE PAYMENT OF MONEY INTO COURT, p. 29.
- (N) — REPLICATION TO, AND SUBSEQUENT PLEADINGS, p. 30.
- (O) — EVIDENCE, p. 30.
- (P) — COSTS, AND EFFECT ON UNDER COURT OF REQUESTS ACT, p. 30.

IV. **PERFORMANCE OF A CONTRACT,** p. 31.

ry, the devise was originally valid, and stood unrevoked; 2 Burr. 1131; Cro. Car. 320; 1 Burr. 84; 1 Prest. Com. 1. By s. 65. of the late bankrupt act, (stat. 6 Geo. 4. c. 16.) the commissioners shall by deed indented and enrolled as aforesaid make sale for the benefit of the creditors as aforesaid of any lands, tenements, and hereditaments situate either in England or Ireland, whereof the bankrupt is seised, of any estate tail in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown; and every such deed shall be good against the said bankrupt and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt by fine, common recovery, or any other means, might cut off or detract from any remainder, reversion, or other interest in or out of any of the said lands, tenements, or hereditaments.

It has been held that under the similar enactments of 20 Jac. 1. c. 19. s. 12. a commission being issued jointly against the tenant for life in possession, and tenant in tail in remainder (who happened to be partners in trade), the commissioners' deed had not the effect of a recovery, but operated separately upon each estate like a fine. Tenant in tail was always allowed to make leases for any term of years; which, during his own life, would be valid and indefensible; and, after his death, if the estate tail continued, would still subsist, unless defeated by the entry of the heir, who, if instead of entering, he accepted rent from the lessee, placed himself in the situation of the lessor. So, a grant (of things lying in grant) or covenant to stand seised (where the proper consideration exists), a bargain and sale or lease and release by tenant in tail to a person and his heirs, gives him a fee simple, necessarily determining on failure of all persons inheritable to the estate tail, but continuing while such persons exist and neglect to enter. If, however, the tenant in tail have aliened the tenement for the term of his own life, he has then nothing more to give by such means. The leases made by indentures of tenant in tail of full age are rendered absolutely valid by the stat. 32 H. 8. c. 28. under certain conditions contained in s. 2.

\* This word, in its ordinary and practical sense, means the formal offer of a debt to the person to whom it is due; it is also referable to a duty to be performed, or a contract to be completed, as to deliver stock, goods, &c. Lord Tenterden, in 3 C. and P. 342. said that a plea of tender was very seldom successful: he regretted to see it pleaded. In most cases it is better to pay money into court than to incur the risk of taking issue on a plea of tender.

[ 22 ]

A tender may be pleaded to a quantum meruit, although the demand be uncertain;†

### III. RELATIVE TO TENDER OF MONEY.

#### (A) IN WHAT ACTIONS IT MAY BE MADE.\*

1. JOHNSON v. LANCASTER. M. T. 1769. K. B. Str. 576. GILES v. HARRIS, M. T. 1697. K. B. 1 Ld. Raym. 255. *contra*.

It was settled on demurrer, that a tender is pleadable to a *quantum meruit*, and said to have been so held before in B. R. 10 W. 3. Giles v. Harris, Salk. 622.

2. JOHNSTON v. CLAY. E. T. 1817. C. P. 1 Moore, 200; S. C. 7 Taunt. 486.

Or upon a bare covenant for the payment of money.

An action of debt had been commenced against the defendant by the plaintiff for non payment of rent. This action had been subsequently discontinued, and an action of covenant commenced for the same rent; the amount of which the defendant tendered previously to the issuing of the writ in the second action. The Court held that the tender was well pleaded.

#### (B) AT WHAT TIME IT SHOULD BE MADE.‡

- HAMMOND v. OUDEN. M. T. 1699. K. B. 12 Mod. 421. S. P. DUKE OF RutLAND v. HODGSON. Stra. 777.

If a thing is to be done at or before a certain day, the tender must be at a convenient time of the day.

[ 23 ]

In an action on the case, the plaintiff declared that in consideration of seventy pounds paid by him to the defendant, the defendant *super de assumpsit* to deliver to the plaintiff on or before the 18th of January following, on board the plaintiff's ship, in such a place, twenty-five quarters of oatmeal, and six hair and splitted sieves. The plaintiff alleged that he did bring his ship on the said 18th of January to the said place, and that the defendant did not deliver to him, &c. Verdict and damages for the plaintiff. That the things were to be delivered on or before the 18th of January, and the breach is laid in not delivering on the 18th, when the promise might be well performed in delivering at any time before. The declaration was good enough without saying that there was no delivery before the 18th; for though the defendant had election to deliver them before the 18th, yet for that there must have been a concurrence of the plaintiff, for he must be there and accept; for the defendant cannot make a tender before the 18th, sufficient to excuse him from making a delivery on the 18th; for the 18th being the ultimate time the law appoints for doing of it, the one party ought to be there, to tender, and the other to accept; and if the defendant had come before the 18th to the place, and tendered it, it would not excuse him from tendering at the day.

#### (C) EFFECT OF MAKING.§

\* A tender cannot in general be pleaded except when the action is brought for the recovery of a certain pecuniary demand, or the making of a tender is expressly authorised by act of parliament.

† Or in covenant for non payment of rent, 1 Sand. 33. d. n. 4.

‡ A tender, to be available, must always be made before action brought; but it is no objection to a tender that the creditor had previously put the matter into his attorney's hands; 1 Marsh. 55; S. S. 5 Taunt. 307. The obligor can plead a tender to one whom the obligee has appointed to receive the money, and refusal of it, but not where he is bound to pay the money to a stranger; Mo. 37. Where the obligee of a bond receives the whole principal after it is payable, he cannot recover in an action on the bond; as *solvit post diem* is a good plea; Daxon v. Parkes, 1 Esp. 110. A plea of tender after the day of payment of a bill of exchange, and before action brought, is not good, though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money then due, owing, or payable to the plaintiff, in respect of the bill, with interest from the time of the default, for the damage; sustained by the plaintiff by reason of the non performance of the promise; Hume v. Peploe, 8 East, 168. When a tender is made in a term prior, in fact, to the commencement of the action, but the declaration is of the same term as that, and refers to the first day of the term, the defendant shall not be allowed to prove the tender in evidence, as there should have been a special memorandum of the day; Rolfe v. Norden, 4 Esp. 72. A defendant who offers payment after action commenced, and before declaration, is not to be indulged by a stay of proceedings on payment of the demand and costs of the writ, unless he can show an actual tender, and unless the declaration was delivered for the sake of enhancing the costs; Gibbon v. Copeman, 5 Taunt. 840; S. C. 1 Marsh. 392.

§ A tender operates like the payment of money into court, as an admission of the contract stated in the declaration; Cox v. Brain, 3 Taunt. 95. A promise to pay the debt of a third person need not be proved to be in writing when the defendant pleads a tender, and pays money into court on such promise; Middleton v. Brower, Peake, 15,

1. ISAAC v. LEDGINGHAM. M. T. 1670. K. B. 1 Vent. 167.  
The Court held that tender and refusal was as much as payment.

2. COX v. BRAIN. T. T. 1810. 3 Taunt. 95.

A count in a declaration in *assumpsit* averred that, in consideration that the plaintiff would let to the defendant certain tithes, the defendant agreed to pay 41*l.* and that the plaintiff did let the said tithes, and did permit the defendant to take them a tender on all the counts generally; was holden to preclude the defendant from showing a legal interruption to his taking them, if any such interruption existed.

tion, care should be exercised not to plead it, where such an admission would be prejudicial.\*

3. SIMON v. GAVIL. T. T. 1703. K. B. Salk. 75; S. C. 2 Ld. Raym. 961.

A submission was of all controversies pending; the arbitrator awarded that all suits now pending between the parties should cease, and that the defendant should pay 10*l.* in full of all demands, and release all demands till the time of the award; and upon the payment of the 10*l.* the plaintiff should release to him, &c. Upon a writ of error of the judgment given in C. B. The Court held, if the plaintiff would not receive the 10*l.*, because he would not be obliged to release when the defendant tendered, and he refused, he was as much obliged to release upon the tender and refusal, as if he had actually received the money.

(D) TO WHOM IT SHOULD BE MADE†.

\* And it was once held, that, after a plea of tender, the plaintiff could not be nonsuited; per Heath, J., in *Harding v. Spicer*, 1 Campb. 327. But now a different rule obtains, 3 Bing. 290. If a writ be returnable on the first return of the term, and the defendant give notice that the debt and costs will be paid before the appearance day, and accordingly tender the debt and costs of the writ before that day, the plaintiff is not entitled to the costs of a declaration, delivered *de bene esse*; *Partington v. Williams*, 2 N. R. 298. Where a defendant, on being taken in execution under a writ of *capias ad satisfaciendum*, tendered the debt and costs to the plaintiff's attorney, and required time to sign his discharge, which he refused to do until he had paid an independent collatera demand for cost; held, that the plaintiff and his attorney were liable to an action on the case for such refusal; *Croner v. Phelling*, 6 D. and R. 129. Where the maker of a promissory note paid money into the hands of an agent to secure it, and the agent tendered the money to the holder of the note, on condition of having it delivered up; the note being mislaid, this condition was not complied with; and the agent afterwards became bankrupt with the money in his hands. Held, that the maker was still responsible on the note; but that interest was not recoverable after the time of the tender; *Bent v. Dunn*, 3 Camp. 296. A formal demand is necessary before an action can be commenced against overseers for the surplus arising from a distress for poor rates, under the stat. 27 Geo. 2. c. 20. s. 2.; and a plea of tender which is proved not to cover the plaintiff's demand will not cure the objection; *Simpson v. Routh*, 4 D. and R. 181; S. C. 2 B. and B. 682.

† Where a man is to pay money upon an act being performed, and there is a tender of performing the act, and a refusal, it is equivalent to its having been done; *Lancashire v. Kellingworth*, Com. 116. If there be a tender of the money after the day, and refusal upon and after debasement of the coin, the debtor shall bear the loss; 1 Dy. 82. Pl. 70. A sum awarded to be paid is lost for ever by tender and refusal; *Genne v. Tinker*, 8 Len. 24.

‡ A tender to a person authorized by the creditor to receive money for him is sufficient; *Goodland v. Blewith*, 1 Camp. 447. And where a clerk, who was in the ordinary habit of receiving money for his master, was directed by his master not to receive the sum in question, for that he had put it into the hands of the attorney, and the clerk on tender made refused to receive the money, assigning the reason, it was held to be a good tender to the principal; *Moffat v. Parsons*, 5 Taunt. 307. A tender to the attorney on the record is a good tender to the principal; *Crozer v. Pilling*, 4 B. and C. 26. When the money was brought to the house of the plaintiff, and delivered to his servant, who retired, and appeared to go to the master, it was held to be evidence to go to the jury, from which they might infer that a tender was made; *Anon.* 1 Esp. 349. A tender to one of several partners is sufficient; *Douglas v. Patrick*, 3 T. R. 683. But a tender of debt due to a bankrupt's estate to a collector employed by the solicitor under the commission is, as it seems, bad; *Blow v. Russell*, 1 C. and P. 465. The obligor of a bond may plead a tender to one whom the obligee has appointed to receive the money and refusal of it, but not where he is bound to pay the money to a stranger, Mo. 37. Two provisions in two indentures of conveyance of two several manners so A. and B. that if the feoffor pay or tender 20*s.* to A. and B. or to the heir of A. they shall be void. A dies; tender to B. is ill, but to the heir of A. is good; yet it must be of two twenty shillings; 3 Dy. 372. Pl. 9. Where the defendant, on going to the office of the plaintiff's attorney to tender the debt,

A tender and refusal is equivalent to payment.

But as it admits the contracts and facts stated in the declaration.

[ 24 ] If a party is under an engagement to release on payment of money, he is bound to release on tender and refusal, as if actually paid.†

[ 25 ]

(E) ON WHOSE BEHALF TO BE MADE.\*

(F) WHAT AMOUNT SHOULD BE TENDERED.†

(G) IN WHAT MANNER TENDER SHOULD BE MADE IN GENERAL.‡

[ 26 ]

(H) OF PRODUCING THE MONEY, AND WHEN ITS PRODUCTION MAY BE DISPENSED WITH.§

1. THOMAS V. EVANS. M. T. 1812. K. B. 10 East, 101.

To make a legal tender there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor.

To an action of *assumpsit*, the plaintiff pleaded a tender of 10*l.* The evidence was, that the defendant, having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part payment; and, on going from home for a time, left the 10*l.* with his clerk there. Some time after the plaintiff called, and demanded 16*l.* 8*s.* 11*d.*, which he said he supposed E. had received; when the clerk told him that E. was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.*, nor any thing less than his whole demand. The clerk did not offer the 10*l.*

The Court were of opinion the evidence was insufficient. Lord Ellenborough, C. J., observing, "It is expressly stated that the clerk did not offer the 10*l.*, he only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it; which is not a tender in law."

or;

was referred to a person in the office, who objected to receive it as insufficient; held that it was good, without proof that the person to whom it was made was authorized on the part of the plaintiff to receive it; *Wilmot v. Smith*, 1 M. and Malk. N. P. 238; and 3 C. and P. 453. A tender made to the attorney or his clerk, after a letter sent by the attorney to demand payment, the authority not being disclaimed at the time, held good; 3 C. and P. N. P. 453. If A. be indebted to several persons in different sums of money, and when they are all assembled together tender there one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being done, this is a good tender; *Black v. Smith, Peake*, 88.

\* *Semb.* a tender must be taken to be made on behalf of the person who owes the money; *Chamout v. Thornton*, 2 S. P. 50. When a party has separate demands for unequal sums against several persons, an offer of one sum for the debts of all will not support a plea, stating that a certain portion of the sum was tendered for the debt of one; *Story v. Harvey*, 3 Bing. 304.

† If a man tenders more than he ought to pay, it is good; for the other ought to accept so much as is due to him; *Wade's case*, 5 Rep. 115. c.; *Astley v. Reynolds*, 2 Str. 916. But it seems that such a tender is only good where it is made in monies numbered, so that the creditor may take what is due to him. Therefore a tender of a 5*l.* note, from which the creditor is desired to take 3*l.* 10*s.*, is good; *Bettensbee v. Davies*, 3 Camp. 70; *Robinson v. Cock*, 6 Taunt. 336; *W. kins v. Robb*, 2 Esp. 710; *Brady v. Jones*, 2 D. and R. 305. But where a greater sum<sup>1</sup> tendered than the sum pleaded, and the creditor refuses to receive it on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is, as it seems, good; *Black v. Smith, Peake*, 88; *Saunders v. Graham, Gow*, 121. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender; *Douglas v. Patrick*, 3 T. R. 683; *Black v. Smith, Peake*, 88. A tender of 2*l.* to pay 1*l.* 13*s.* is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change; *Cadinon v. Lubbock*, 5 D. & R. 289.

‡ Bank notes were not made a legal tender by the 37 Geo. 3. c. 45; *Grigby v. Oakes*, 2 B. and P. 526. But a tender of a Bank of England note is good if not objected to at the time; *Brown v. Saul*, 4 Esp. 267; *S. P. Wright v. Read*, 3 T. R. 554. A tender in a Bristol bank bill was held in the Exchequer not to be a good tender, though no objection was made to it on that account; *Mills v. Safford, Peake*, 180. n. But before and after that case it was held in the King's Bench that a similar sort of tender was good; *Lockyer v. Jones, Peake*, 180. n. † And in *Wilby v. Women*, M. T. 28 Geo. 3. Buller, J., held that a draft on a banker was a good tender, if not objected to by the creditor. See 56 Geo. 3. c. 68, s. 11. by which gold coin is declared to be the only legal tender; and see 51 Geo. 3. c. 127. s. 2.; 52 Geo. 3. c. 50. s. 6. as to the tender of Bank notes by tenants in case of distress for rent.

§ The manner of the tender and of the payment should be directed by him who makes them, and not by him who accepts; *Pennel*, 5 Co. 117. a. A tender of money in bags is valid without showing or counting it, if the proper sum was deposited in them; *Wade's case*, 5 Co. 114. a.



2. **BLACK V. SMITH.** M. T. 1791. Peake, 83. S. P. **COLE V. BLAKE.** Id. 179.

Per Lord Kenyon. I take it to be clear beyond a doubt, that if the debtor tenders a larger sum than is due, and asks change, this will be a good tender, if the creditor does not object to it on that account, but only demands a larger sum. There is not any occasion to produce the money, if the creditor refuses to receive it on account of more being due.

As where the creditor insists on more money being due than the amount tendered.\*

## (I) OF ITS BEING UNCONDITIONAL.

**BRADY V. JONES.** H. T. 1823. K. B. 2 D. & R. 305.

[ 27 ]

A tender of sovereigns was made by the defendant to cover a demand of 6*l.* 17*s.* 6*d.*, at the same time he delivered in writing a counterclaim upon the plaintiff. The plaintiff did not take up the paper or money, but simply said, "You must go to my attorney." The tender was held insufficient, because to support such a plea there must be evidence of an offer of the specific sum due, unqualified by any circumstances whatever.

To tender a tender available, the offer to pay must be unqualified 1

\* Where a defendant tendered seven sovereigns in payment of a demand of 6*l.* 17*s.* 6*d.*, and said to the plaintiff, "There take your demand;" and at the same time delivered a counter claim upon the plaintiff of 1*l.* 5*s.*, who said you must go to my attorney: held, that this was not sufficient to support a plea of tender to an action brought for 6*l.* 17*s.* 6*d.*; **Brandy v. Jones**, 2 D. & R. 305; **Holland v. Phillips**, 6 Esp. 46. Where a person offered a sum of money by way of tender, and stated the precise sum he so offered, which he held in his hand, it is a sufficient tender, it was twisted up in bank notes, and not shown to the party; but if the amount of the sum had not been mentioned, it seems that it would not have been a good tender; **Alexander v. Brown**, 1 C. & P. 288. If an interview between plaintiff and defendant, when defendant was willing to pay 10*l.*, a third person offer to go up stairs to fetch that sum, but is prevented by the plaintiff's saying he cannot take it, such offer is a good tender; and, although the defendant did not, at the time, take notice of what was done, yet his pleading it afterwards is a sufficient ratification of the act; **Harding v. Davis**, 2 C. & P. 77. Where the defendant ordered A. to pay the plaintiff 7*l.* 12*s.* and the clerk of the plaintiff's attorney demanded 8*l.*; on which A. said that he was only ordered to pay 7*l.* 12*s.* which sum was in the hands of B., and B. put his hand to his pocket, with a view of pulling out his pocket-book, to pay 7*l.* 12*s.* but did not do so by the desire of A., but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time; held, that this was not a legal tender, as the money should have been produced to the attorney's clerk; **Crous v. Arnold**, 7 Mod. 59. Where the defendant went to the plaintiff, and told him that he had eight guineas and a half in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff him he need not give himself the trouble of offering it, for that he would not take it, the tender was held to be good; **Douglas v. Patrick**, 3 T. R. 684. The agent of the defendant met the plaintiff in the street, and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him 4*l.*; the plaintiff said he would not take it. The witness then said he would give him the other 10*s.* out of his own pocket, and run the risk of being repaid. He then pulled out his pocket-book, and told the plaintiff, that if he would go into a neighbouring public-house he would pay him, but the plaintiff said he would not take it: this tender was held to be good. **Read v. Golding**, 2 M. & S. 86.

† Hence a tender, accompanied with a protest against the party's liability, appears to be insufficient; **Simons v. Wilmott**, 3 Esp. 91. So an offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender, **Evans v. Judkins**; 4 Campb. 156; **Huxham v. Smith**, 2 Campb. 21. So where the tender is accompanied with a demand of a receipt in full, **Glasscot v. Day**, 5 Esp. 48; but though a party

## (J) OF A SUBSEQUENT DEMAND AND REFUSAL OF THE SUM TENDERED.\*

## (K) OF THE FORM OF THE PLEA.†

tendering money cannot, in general, demand a receipt for the money, yet where the creditor did not object to a demand of a receipt, but that the sum was insufficient, the tender was held by Lord Kenyon to be good; *Cole v. Blake, Peake*, 179. But where the defendant took the money out of his pocket, and said, if you will give me a stamp receipt, I will give you the money, and the plaintiff replied that he would not take it, but would serve him with a Marshalsea writ, *Abbot, C. J.*, held this to be no proof of a tender; *Laing v. Meader*, 1 C. & P. 257. The debtor ought to bring a receipt with him, and require the creditor to sign it; and if the latter refuses, he is liable to a penalty by 43 Geo. 3. c. 126. s. 45. If ten sovereigns are offered to a person, and he is told that he may take those ten sovereigns in full of his demand, this is not a good tender, *Cheminont v. Thornton*, 2 C. & P. 50; if a person put down a sum of money, and the plaintiff offer to take it in part, and the defendant will not allow him to do so, saying, that no more is owing; this is not a good tender, because a person tendering money should tender it without making any terms, and leaving it open for one party to say that more was due; and to the other, that the sum tendered was sufficient; *Peacock v. Dickson*. Going with money in hand to make a tender, demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, without any actual offer of the money, will not support a plea of tender; *Ryder v. Townsend*, 7 D. & R. 119.

\* To a plea of tender, the plaintiff may reply a subsequent demand and refusal of the sum tendered. Issue being joined on the fact of this demand, it will be incumbent on the plaintiff to prove that he demanded the precise sum before tendered; proof of a demand of a larger sum than that which was originally tendered will not support the issue; *Spybey v. Hide*, 1 Campb. 181; 5 B. & A. 630; *Coore v. Callaway*, 1 Esp. 115. The demand ought to be made by some person authorized to give the debtor a discharge. Hence, in a case where the demand had been made by the clerk to the plaintiff's attorney, who had never seen the defendant before going of this errand. Lord Ellenborough held the demand insufficient; admitting, however, that a demand by the attorney himself might have done; *Coles v. Bell*, 1 Campb. 478. A subsequent demand upon one of two joint debtors is sufficient, *Peirse v. Bowles*, 1 Stark. 348. A letter written by the plaintiff's attorney, and received by the defendant, demanding the sum tendered, is not, as it seems, sufficient evidence of a subsequent demand; for at the time of the demand, the defendant should have an opportunity of paying the sum demanded; *Edwards v. Yates*, 1 R. & M. 360; *Haywood v. Hague*, 4 Esp. 93. But a letter demanding payment of a debt sent to the defendant's house, and to which an answer is returned that the demand should be settled, is a sufficient evidence to go to the jury, of a demand on the issue of a subsequent demand and refusal; *Hayward v. Hague*, 4 Esp. 93.

† A tender cannot be given in evidence under the general issue, but must, in all cases, be pleaded where the money is due, and payable immediately, by the agreement; the party pleading a tender must show that he was always ready from the time when the cause of action accrued. Hence, to an action of *indebitatus assumpsit*, where the defendant pleaded that before the action, viz. on such a day, he tendered a certain sum of money, and that he was always afterwards ready, and then was ready, on demurrer the plea was holden bad. By the Court: it was not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action. so where, to an action by the indorsee of a bill of exchange, the defendant pleaded that after the expiration of the time appointed for the payment of the bill and before action brought, he, the defendant, tendered the whole money then due upon the bill, with interest, in respect of the damages sustained by the non-performance of the promise;

## (L) OF AT WHAT TIME A PLEA OF TENDER MUST BE PLEADED.\*

[ 29 ]

and that he always, from the time of making the tender, had been, and still was, ready to pay, &c.; on demurrer, the plea was holden bad. Lord Ellenborough, C. J., observing, that in *Giles v. Harris*, it was expressly decided that an averment of *tout temps prist* was necessary in a plea of tender, and that it was one of those land-marks in pleading which ought not to be departed from. A plea that the defendant is ready, and always has been ready with a *profert in curia*, but not averring a tender, will be bad on general demurrer. It is not necessary that a plea of tender to an action of *indebitatus assumpsit* should answer a special request laid in the declaration; on a day subsequent to the day on which the promise is laid, because such request is surplusage, and therefore the day on which it is made is wholly immaterial. Plea of tender and refusal is in general not sufficient, unless he pleads "always ready;" *Turner v. Goodwin*, Stark. 150; 1 Dy. 24. Pl. 154; 1 Saund. 33. P. Ready from the time of the tender, is not sufficient; *Habdeny v. Tuke*, Willes, 632. In debt on bond conditioned to pay 500*l.* to the administrator of the obligee within two months after his death; a plea that he was ready to pay it, but that no administrator was appointed, without saying *encore prist*, is bad; *Lee v. Garrett*, 2 Show. 144. If *tout temps prist* be pleaded by an administrator, he must aver that his intestate was at all times, from the time of making the promise to the time of his death, ready to pay; and that he has, at all times since the death of the testator, been ready to pay; *Say*, 18. Where the money is to be paid in discharge of a debt, *tout temps prist* must be pleaded, notwithstanding a tender; *Hammond v. Webb*, 10 Mod. 282.

But in debt on bond to pay a certain sum on a certain day, there a tender on the day, and *semper paratus*, is a good plea, but not in *assumpsit*, without *tout temps prist*; *Giles v. Hart*, 3 Salk. 343; 1 Ld. Raym. 251; *Carth*. 413.

So, in pleading a tender of a sum of money according to a defeasance which is in a different instrument from the original deed, it is not necessary either to plead that the party has always been, and still is, ready to pay, or to bring the money into court; *Trevett v. Aggas*, Willes, 111; 2 Saund. 48.

*Aliter* if the defeasance be in the same deed; *Willes*, 110. On covenant to pay money, damages being only to be recovered, tender and refusal is a good plea, without *encore prist*; *Carter v. Downisby*, 1 Show. 130. A tender in debt is to be pleaded in bar of damages; 2 Salk. 623. 1 Saund. 33. c.; 12 Mod. 86; *Giles v. Harris*, 1 Ld. Raym. 254. In *assumpsit* it is pleaded in bar of further damages; 1 Saund. 33. c.; *Swetland v. Squire*, Salk. 623.

A tender can be pleaded to an avowry only in excuse of damages; *Horne v. Lewin*, 1 Ld. Raym. 644; *Osborne v. Beversham*, 1 Vent. 322. Under the stat. of Anne, it has been holden, that the defendant shall not be allowed to plead any pleas that are manifestly inconsistent; such as *non assumpsit* or *non est factum*, 5 T. R. 97; to the whole declaration; and a tender as to part for one of these pleas goes to deny that the plaintiff ever had any cause of action, and the other partially admits it. In an action of debt the defendant, in pleading a tender, ought to conclude his plea by praying judgment, if the plaintiff ought to have or maintain his action to recover any damages against him; for in this action the debt is the principal, and the damages are only accessory; but in *assumpsit* the damages are the principal; and therefore, in pleading a tender, the defendant ought to conclude his plea with a prayer of judgment. If the plaintiff had to maintain his action to recover any more or greater damages than the sum tendered, or any damages by reason of the non-payment thereof, in pleading matter of estoppel, the defendant, in his conclusion, ought to reply upon it; *Co. Lit.* 303. b.

\* It is a general rule that a tender cannot be pleaded after any kind of imparlance; because the imparlance is contradictory to that part of the defendant's plea in which he alleges that he was always ready; a tender must, therefore, be pleaded before the imparlance of the same term with the declaration, unless the declaration be delivered or filed so late that the defendant is

[ 30 ]

(M) OF THE PAYMENT OF MONEY INTO COURT.\*

(N) OF THE REPLICATIONS TO, AND SUBSEQUENT PLEADINGS.†

not obliged to plead to it that term; and then it may be pleaded of course within the first four days inclusive of the next term, as of the preceding term.

Under particular circumstances the Court will give the parties, on an early application, leave to plead a tender after an imparlance; as where the writ is returnable in Easter term, and the declaration not delivered until the day before the essoign day of Trinity term, on which day it was sent by the post to Shrewsbury, where the defendant lived, so that the agent could not procure instructions to plead a tender within the four days of Trinity term. Where the declaration is entitled of the term generally, and the defendant pleads a tender upon which he would give in evidence a tender made between the first day of the term to which the bill relates and the day of suing out the writ, he may apply to the Court to oblige the plaintiff to entitle his declaration specially; but this application must be supported by an affidavit of a tender made on such a day.

\* On a plea of tender with a *profert in curia*, the sum tendered must be paid to the signer of the writs, in the King's Bench, or prothonotaries in the Common Pleas, who will give a receipt for it in the margin of the plea; and if not paid, the plaintiff may consider the plea as a nullity, and sign judgment. If the defendant bring money into court upon a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before action brought. Or, he may reply a subsequent demand and refusal over verdict for the plaintiff on issue taken thereon. Lord Mansfield said, the money having been taken out of Court, the plaintiff shall recover only nominal damages; but otherwise the verdict would have been for the sum tendered. A plea of tender without bringing the money into court when necessary, is a nullity, *Bray v. Booth*, 1 Barnes, 181; and the plaintiff shall take judgment; *Reher v. Skelton*, Stra. 638. An admission of the tender is not necessary to enable plaintiff to take the money out of Court; 1 Saund. 33; *contra* 2 Ld. Raym. 774. Money brought in on pleading a tender, cannot be taken out by the defendant, though he has a verdict; *Cox v. Robinson*, Stra. 1027. Held, that plaintiff could not proceed for damages where money was paid generally on the whole declaration in *assumpsit* after taking the money tendered out of court; *Burton v. Souter*, 2 Ld. Raym. 774. On a tender to one of two counts, plaintiff may proceed on the other, though he take the money out of court; 1 Saund. 33.

† The plaintiff, in his replication, may deny the tender, or reply a writ issued, or a prior or subsequent demand, or may admit the tender, and add the *similiter* to the general issue. If to a plea of tender, the plaintiff reply a *latitat*, and that the tender was not made before the suing out the *latitat*, the defendant may rejoin that the plaintiff had not any cause of action at the time of suing it out, because the plaintiff, by the replication, makes the *latitat* the commencement of the suit, therefore, it may be considered in the nature of an original writ, and the defendant ought to have the same advantage of it as the plaintiff. A replication to a plea of tender stating an original writ sued out and returned before the tender, but not proceeded upon, and then a second original writ sued out after the tender, and proceeded upon, but unconnected with the first writ, is no answer to the plea; *Stratton v. Savignac*, 3 B. & P. 230. It is no answer to a plea of tender, before the exhibiting of the plaintiff's bill, that the plaintiff had, before such tender, retained an attorney, and instructed him to sue out a *latitat* against the defendant, and that the attorney had accordingly applied for such writ before the tender, which was afterwards sued out; *Briggs v. Calverly*, 8 T. R. 629. To a plea of tender the plaintiff replied a demand and refusal. Before suing out the writ, the defendant tendered, &c., traversing that at any time after the tender, and before suing out the writ, the plaintiff requested him to pay, &c., the rejoinder is bad; *Willes*, 602.

## (O) OF THE EVIDENCE.\*

## (P) OF THE COSTS.†

HAND V. DINELY. H. T. 1749. K. B. 2 Stra. 1220.

In *assumpsit*, the defendant paid money into court on the usual terms of paying costs to that time; the plaintiff took it out, and taxed his costs, and served the defendants' attorney; and they not being paid, went on to trial, and obtained a verdict for 7*l.* 18*s.* The defendant insisted that he should have no costs for his subsequent proceedings, since it appeared that he was overpaid. But the Court held, that as to the costs, it was to be considered as if no motion had been made, the defendant not having fulfilled the terms of her own rule, in which case it is not usual to grant an attachment, but the plaintiff goes on, it being only a conditional rule. They said they would make him allow upon the execution for the 8*l.* he had taken out of court, and ordered him the *postea*, in order to tax his whole costs.

If the costs are not paid on bringing money into court on a plea of tender, the plaintiff must proceed in the action, and cannot have an attachment.

[ 31 ]

## IV. RELATIVE TO TENDER OF PERFORMANCE OF A CONTRACT, &amp;c.‡

**Tenure.** See *ante*, tit. *Estates*.

**Terms and Returns.** §

\* The nature of the evidence required to sustain or defeat a plea of tender may be readily understood from what has been stated under the three first divisions of this title, to which the reader is referred.

† Where the defendant pleads *non assumpsit* as to all but a particular sum, and as to that sum or tender, and on the trial the fact of the tender is found for him, but that the sum tendered is not sufficient, by which the plaintiff has a verdict of the general issue, and judgment for his damages and costs; in such case there is not an instance of the costs of the issue on the plea of tender ever having been taxed for the defendant. So, where in a similar case the issue on the plea of tender was found for the plaintiff, and on *non assumpsit* for the defendant, the plaintiff was holden to be entitled to the general costs of the cause. If by the plea of tender being found for the defendant the balance proved upon the *non assumpsit* is under 40*s.*, the jurisdiction of the superior court will not be effected, and the defendant will not be permitted to enter a suggestion on the roll in order to obtain his costs.

‡ It is good defence to an action for the non-performance of the contract to say, that the defendant offered, and was always ready to perform it; as, where a party has agreed to execute a deed in favour of another, it suffices if he tender a draft of such deed, and it is not necessary to proceed to execute a conveyance if the other party refuse to complete the bargain; and where concurrent acts by two parties are to be performed, a readiness and offer by one person to perform his part entitles him to proceed against the other for refusing to perform his part, without making a formal tender, as in the case of a sale of goods, to be paid for on delivery, when the purchaser is ready to pay, and the vendor refuses to deliver; *Rawson v. Johnson*, 1 East, 201. See *post*, Vendor and Purchaser.

§ There are four terms in the year, which are called from some festival or saint's day preceding their commencement; the terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael. Hilary term begins on the octave of St. Hilary, or the eighth day inclusive after the feast day of that saint, which, falling on the 15th of January, the octave therefore, on first day of Hilary term, is the 20th of January, and it ends on the 12th of February following, unless it happen on a Sunday, and then on the 13th of February; Easter term begins in fifteen days of Easter, being the Sunday fortnight after that festival, and ends on Monday before Whitsunday; Trinity term, which was abridged by the stat. 32 Hen. 8. c. 21., begins on the morrow of the Holy Trinity, being the Monday next after Trinity Sunday, and ends on the

- [ 32 ] **Terms, Notice to Plead.** See *ante*, tit. *Plea*.  
**Terms Notice of Trial.** See *post*, tit. *Trial*.  
**Terms for Years.** See *ante*, tit. *Lease*.  
**Terriers.** See *ante*, tit. *Evidence*, vol. ix. p. 210.  
**Testament.** See *post*, tit. *Will*.  
**Testamentary Guardian.** See *ante*, tit. *Guardian and Ward*.  
**Testator.** See *ante*, tit. *Devise*; *post*, tit. *Will*.  
**Testator's Will.** See *ante*, tit. *Process*.  
**Teste of Writs.** See *ante*, tit. *Process*.  
**Thames.** See *post*, tit. *Watercourse*.  
[ 33 ] **Theatre.** See also *ante*, tit. *Licence*.

1. **REX v. HANDY.** E. T. 1796. K. B. 6 T. R. 286.

Tumbling  
is not an  
entertain-  
ment of the  
stage with-  
in the 10  
Geo. 2.\*

The defendant was convicted in the penalty of 50*l.*, under 10 Geo. 2. c. 28. for acting, representing, and performing, a certain entertainment of the stage, called tumbling, &c. at Birmingham, which conviction was moved by *certiorari* in order to take the opinion of the Court whether this offence came within the statute. Lord Kenyon, C. J., *inter alia*, said, I do not think that tumbling is an entertainment of the stage within the meaning of the act. It might equally be said that fencing on a public stage is. By the third section of this act, a copy of the piece to be represented is to be sent to the Lord Chamberlain for his approbation previous to its production, but no copy could have been given of this entertainment. This is a penal act, and cannot be extended to entertainments which did not exist when the act was made.

Wednesday three weeks after, unless it happen on the 24th of June, and then on the day following; Michaelmas term, which was abridged by the stat. 16 Car. 1. c. 6., and still further by the 24 Geo. 2. c. 48., begins (five weeks after Michaelmas day) on the morrow of All Souls, being the 3d of November, and ends on the 28th of November following, if not a Sunday, otherwise on the 29th. Of these terms it may be observed, that Michaelmas and Hilary are fixed terms, and invariably begin on the same day of the year, but Easter and Trinity terms are moveable, their commencement being regulated by the feast of Easter. After Hilary and Trinity terms, the judges go their circuits for the trial of causes wherein issues have been previously joined, and hence they are called issuable terms. In each of these terms there are stated days, called general or common return days; of these there are four in each, except Easter, which has five. In Hilary term the general or common return days are in eight days of St. Hilary, in fifteen days of St. Hilary, on the morrow of the Purification, and in eight days of the Purification; in Easter term they are in fifteen days of Easter, in three weeks after Easter, in one month after Easter, in five weeks from Easter day, and on the morrow of the Ascension; in Trinity term they are on the morrow of the Holy Trinity, in eight days of the Holy Trinity, in fifteen days of the Holy Trinity, and in three weeks after the Holy Trinity; and in Michaelmas term they are on the morrow of All Souls, and on the morrow of St. Martins. Some of these return days happen on a Sunday; and anciently, when writs were formed, courts of justice did actually sit on that day; but that practice having been long disused, it is holden that an appearance cannot be entered, nor any judicial act done, or supposed so to be done, by the Court till the Monday.

\* By 28 Geo. 3. c. 30 the justices in session, on petition, may license the performance of such plays as are performed at either of the patent theatres, or have been inspected by the chamberlain of the household, for not more than sixty days, to commence within the next six months, and to be within such four months as shall be specified in the licence, so as there be but one licence in use at the same time, the place not being within twenty miles of London, Westminster, or Edinburgh; or eight miles of any patent or licensed

2. *CLIFFORD v. BRANDON*. M. T. 1811. N. P. 2 Campb. 358.

Action of assault and false imprisonment. That the defendant, with force and arms, &c. made an assault upon the plaintiff in a certain public theatre, called the New Theatre Royal, Covent-garden, situate in the parish of St. Paul, Covent-garden, in the county of Middlesex, and seized and laid hold of the plaintiff, and struck him a great many violent blows, and forced and compelled him to go from and out of the theatre, into, and along a certain street there to a certain police-office, situate and being in the parish aforesaid, in the county aforesaid, and imprisoned him, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for a long space of time contrary to the laws of this realm, &c. It appeared that the plaintiff at the said theatre had, with divers other persons, committed and made a riot.

Per Lord Ellenborough, C. J. Although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet, if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are, in point of law, guilty of a riot.

**Threats and Threatening Letters.†**

theatre; or ten miles of the royal residence, or of any place at which, within six months preceding a licence under this act shall have been had; or within fourteen miles of either of the universities; or within two miles of the limits of any peculiar jurisdiction; and so, also, as no licence under this act shall have been had at the same place within eight months before. But no licence shall be granted within any town unless three weeks' notice be given to the mayor, or chief officer, of the intended application. The 17 Geo. 2, c. 5, in which players are considered vagrants, appears to have expired, as they are not enumerated as such in the vagrant act 5 Geo. 4, c. 28. No new plays, or additions to old ones to be acted, unless a copy thereof be sent to the Lord Chamberlain fourteen days before. The Lord Chamberlain may prohibit the acting any play or part thereof; and persons acting the same before such copy be sent, or contrary to such prohibition, to forfeit 50*l.* and their licence. Plays acted in public houses to be deemed performed for gain, and prosecutions must be within six months. A forfeiture of 100 marks is incurred by representing a play derogatory of the book of common prayer, 8 Jac. 1, c. 21; and 10*l.* for jesting the holy name of God, or of Jesus Christ, or of the Holy Ghost, or Trinity, 1 Car. 1, c. 1; and also 3*s.* 6*d.* for acting on a Sunday; 1 Eliz. c. 2, s. 9. Respecting country theatres, see 10 Geo. 2, c. 18, s. 6, and 16 Geo. 3, c. 18. For the power of the universities over players see 10 Geo. 2, c. 19, s. 1. By 16 Geo. 3, c. 81, and 28 Geo. 3, c. 80, certain lands for charitable purposes are secured to Drury Lane and Covent Garden. As to the interference of the Court of Chancery in the affairs of a theatre, see 7 Ves. 617.

\* A. cannot maintain an action for a libel upon B. whereby the latter was deterred from singing at A.'s theatre, to the diminution of his profits; *Ashley v. Harrison*, Peake, 194; 1 Esp. 48. A person, engaged by the manager of a theatre as a public singer, is beaten, and is thereby prevented from performing, the manager cannot sue for the remote injury which he sustains; *Taylor v. Nuri*, 1 Esp. 386.

† By the stat. 7 & 8 Geo. 4, c. 29, s. 7, it is enacted that, if any person shall accuse, or threaten to accuse, any other of any infamous crime, hereinafter defined, with a view or intent to extort or gain from him, and shall, by intimidating him by such accusation or threat, extort or gain from him, any chattel, money, or valuable security, every such offender shall be deemed guilty of robbery, and shall be indicted and punished accordingly.

And by the 9th sect. of the same statute, it is enacted that the abominable crime of burglary, committed either with man or with beast, and every assault with intent to commit the said abominable crime, and every attempt or endeavour to commit the said abominable crime and every solicitation, persuasion, promise, or threat, offered or made to any person, whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act. The provisions of the 9th section are taken from the stat. 6 Geo. 4, c. 19; which defined infamous crimes in nearly the same terms as the present enactment, except that the statute included rape, and attempts, &c. to commit it. That statute was passed because it had been held by the twelve judges in *Hickman's case*, Ry. & M. C. C. R. 34, that a making of overture to

† By the stat. 7 & 8 Geo. 4 c. 29, s. 8, it is enacted that, if any person shall knowingly send or deliver any letter or writing, demanding of any person, with menaces, and with-

REX v. SOUTHERTON. H. T. 1805. K. B. 6 East, 126.

At common  
law, threats  
and threat-  
ening let-  
ters not cal-  
culated to  
overcome a  
firm and  
prudent  
man, are  
not indict-  
able.

In this case the question was, whether threatening by letter, or otherwise to put in motion a prosecution by a public officer, to recover penalties for selling Friar's Balsam without a stamp, which, by the stat. 43 Geo. 3. c. 3. is prohibited to be vended without a stamped label, for the purpose of obtaining money to stay the prosecution, was such a threat as constituted an offence at common law, no money having been obtained. Lord Ellenborough, C. J., said: To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral action; but to make it indictable, the threat must be of such a nature as is calculated to overcome a firm and prudent man. Now, the threat used by the defendant, at its utmost extent, was no more than that he would charge the party with certain penalties for selling medicines without a stamp. That is not such a threat as a firm and prudent man might not have

commit sodomy was not an infamous crime; because a conviction for such offence would not subject the party to infamous punishment, or prevent his being a witness. By the stat. 7 & 8 Geo. 4. c. 27. the stat. 6 Geo. 4. c. 19. is wholly repealed.

out any reasonable or probable cause, any chattel, money, or valuable security; or if any person shall accuse, or threaten to accuse, or shall knowingly send or deliver any letter or writing, accusing, or threatening to accuse, any person of any crime punishable by law with death transportation, or pillory, or of any assault with intent to commit any rape, or of any attempt to commit any rape; or of any infamous crime, as hereinafter defined, with a view or intent to extort or gain from such person any chattel, money or valuable security, every such offender shall be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years; and, if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment.

This provision is taken with some improvements from the provisions on the subject contained in the 4 Geo. 4. c. 64 by which it is enacted that, from and after the passing of this act, if any person shall knowingly and wilfully send or deliver any letter or writing with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of his majesty's subjects, or to burn or destroy his or their houses, out-houses, barns, stacks of corn, or grain, hay or straw, and shall procure, counsel, aid, or abet the commission of the said offences, or any of them; or shall forcibly rescue any person being lawfully in custody of any officer, or other person, for such offences, every person so offending, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the Court, to be transported beyond the seas for life, or for such term, not less than seven years as the Court shall adjudge; or to be imprisoned only, or imprisoned and kept to hard labour in the common gaol or house of correction, for any term not exceeding ten years. That statute repealed so much of the stat. 9 Geo. 1. c. 22. the Black Act, as related to the capital offence of sending or delivering any letter without a name, or signed with a fictitious name, demanding any valuable thing; and also repealed so much of the stat. 27 Geo. 2. c. 15. as relates to the capital offence of sending or delivering threatening letters; and also repealed the 1st. sect. of the stat. 30 Geo. 2. c. 24. which related to the offence of sending, &c., letters threatening to accuse persons of certain crimes; but the stat. 52 Geo. 3. c. 64. is not repealed; and now by the stat. 7 and 8 Geo. 4. c. 27. the stat. 4 Geo. 4. is wholly repealed, except so far as relates to any person who shall send or deliver any letter or writing, threatening to kill, or to murder, or to burn, or destroy, as therein mentioned, or shall be accessory to such offence; or shall forcibly rescue any person being lawfully in custody for any such offence. Dropping a letter in a man's way that he may pick it up, was sending it to him; *Rex v. Wugstaff, Russ. and Ry. C. C. R. 398.*

And it was a sending within the stat. 27 Geo. 2. c. 15. though the party saw the prisoner drop the letter, if the prisoner did not think the party knew him, and intended he should not; *S. C.* Though the contents of the letter may lead the party to suspect who wrote the letter, this will be no answer to the charge, unless it be shown that the prisoner did not conceal himself; *S. C.* To have brought the offence within stat. 27 Geo. 2. c. 15. the letter must have been sent to the person threatened, and so stated in the indictment; but the twelve judges intimated that, if a letter threatening A. is sent to B. and the prisoner intended that he should deliver it to A., and he does so deliver it this is a sending; *Rex v. Puddle, Russ. and Ry. C. C. R. 484.* As to threatening to accuse persons of crimes; and extorting money, an indictment, charging that the prisoner did feloniously and maliciously, with intent to extort, &c., menace, and threaten to prosecute L. N., was not good under the stat. 4 Geo. 4. c. 54; but if the indictment had followed the terms of the statute, and the evidence been of a threat, to prosecute, the judge would have left it to the jury to say whether that was not a threatening to accuse; *Rex v. Abgood, 2 C. and P. 436.*



resisted at common law. The principal case relied on is that of *Reg. v. Woodward* and others, which was, where the defendants, having another man in their actual custody at the time, threatened to carry him to gaol, upon a charge of perjury, and obtained money from him under that threat, in order to permit his release; 11 Mod. 137; 6 East, 133, 134. Was not that an actual duress, such as would have avoided a bond given under the same circumstances? But that is very unlike the present case, which is that of a mere threat to put process in a penal action in force against the party. The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats. Money obtained in the former cases, under the influence of such threats, may amount to robbery; but not so in cases of threats of other kinds. But this is a case of threatening, and not of deceit; and it must be a threat of such a kind as will sustain an indictment at common law, either according to one case attended with a duress, or according to others, such as may overcome the ordinary free will of a firm man, and induce him, from fear, to part with his money. The present case is nothing like any of those; it is a mere threat to bring an action which a man of ordinary firmness might have resisted. [ 36 ]

**Timber.** See *ante*, tits. *Estate*; *Trees*; *post*, tit. *Waste*.

**Time.** See *ante*, tits. *Bills and Notes*; *Limitations*, *Statute of*.

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GAL PROCEEDINGS. See different titles relating to the  
nature of the proceeding, as, *Bail*, *Plea*, &c. &c.

#### I. RELATIVE TO YEARS.

[ 37 ]

1. ANON. T. T. 1698. K. B. Ld. Raym. 480.

An action was brought upon a policy of insurance for insuring the life of Sir R. H. for one year from the day of the day date. The policy was dated the 3rd September, 1697, and Sir R. died the 3rd of September, 1698, at one o'clock in the morning; and Per Holt. C. J. The office having insured the life of Sir R. for a whole year, the year was not complete until the said day was expired. Under a policy to insure a life for a year, it expires that day twelve months.

2. ANON. 1678, K. B. 1 Ld. Raym. 480. S. P. FITZHUGH V. DENNINGTON, M. T. 1704. 2 Ld. Raym. 1036.

Per Holt, C. J. A. was born the 3rd September, and the 2nd of September, twenty-one years after, he made his will; and it was held a good will, because the Court would not make a fraction of a day; and consequently being of an age of twenty-one years, he might devise his lands. A person is of age the day before his 21st birth-day.

See *ante*, tit. *Infant*.

#### II. RELATIVE TO MONTHS.

1. LANG V. GALE. H. T. 1813. K. B. 1 M. & S. 111.

Upon a sale of land on the 24th of January, it was agreed, by the conditions of the sale, that an abstract of the title should be delivered to the purchaser within a fortnight from the date thereof; to be returned by him at the end of two months from the said date; and that a draft of the conveyance should be delivered within three months from the said date, to be re-delivered. In the computation of contracts, the word "months," depends on the intention.

within four months from the said date, and the purchase to be completed on the 24th of June, making a period of precisely five calendar months from the date of the sale and conditions. The word "months" was held to be calendar, and not lunar, by reference to the whole period fixed for the completion of the contract; the condition for the delivery of the draft of the conveyance within three months, was not a condition precedent with respect to its delivery within the precise time.

2. SHARP V. HUBBARD. M. T. 1674. K. B. 2 Mod. 58. n.

Generally the word "month" means lunar.\*

[ 38 ] Hence in statutes the word "month" means lunar, unless the contrary be expressed.†

*Per Cur.* According to 2 Roll. Abr. 521; 2 Roll. Rep. 179; Lit. 19, it is held that the computation of months shall in general be lunar, which month is regularly in law counted twenty-eight days; Co. Lit. 135; Cro. Jac. 167; 4 Mod. 95.

3. LACON V. HOOPER. M. T. 1696. K. B. 6 T. R. 224.

In this case, the question was on the 28 Geo. 3, c. 20, as to the Southern Whale Fishery. The word "month" is used in the statute without the addition of "calendar" or any other lunar month.

Grose, J. On the question whether months used in an act of parliament mean lunar or calendar months, we ought not now to raise the least doubt. It is right to adhere to that exposition of the word which has so frequently and so solemnly been put upon it in the former.

4. TULLET V. LINFIELD. M. T. 1764. K. B. 1 Bla. 450; S. C. 3 Burr. 1455; S. C. Doug. 363.

So in legal proceedings the word "month" generally means lunar.

Order for a month's time to plead. No plea being put in, the plaintiff, on the twenty-ninth day after, signed judgment. Motion to set aside the judgment as irregular, because the order shall be construed to extend to a calendar month, as most beneficial to the party; but by

Ld. Mansfield, C. J. A month in law is always a lunar month, except in *quare impedit*. And by Dennison, J. In all temporal cases we go by lunar months; in ecclesiastical cases, by solar.

### III. RELATIVE TO DAYS.

PUGH V. ROBINSON. H. T. 1786. K. B. 1 T. R. 116.

To avoid injustice a day is divisible.‡

*Per Cur.* To avoid injustice, a day is divisible; though the law does not in general allow of fractions of a day, yet the Court will take notice of their usual time of sitting, before which time the contract might have been made and broken, and then the declaration may well be supported; Symons v. Low, Sty. 72. See *ante*, tit. Bankrupt.

### IV. RELATIVE TO HOURS.§

\* Thus in the condition of re-entry for non-payment of rent, by the space of a month, the month shall be computed according to twenty-eight days to the month; Lut. 461.

† But the six months in which by the stat. 2 & 3 Ed. 6. c. 13. s. 4. the suggestion for a prohibition is to be proved, must be reckoned according to the calendar; Sharp v. Hubbard, 2 Mod. 58; Copley v. Collins, Hob. 159. So, when a statute speaks of six months in a matter which concerns ecclesiastical affairs, as in *quare impedit*, in the case of lapse the time shall be computed according to the calendar, because that is the mode of computation in such case in the ecclesiastical courts; Sharpe v. Hubbard, 2 Mod. 58; Catesby's case, 6 Co. 71. b.; Cro. Jac. 141. 160; Jenk. 282; Yelwe. 100; Woodard v. Hammerly, Skin. 313.

‡ And the mode of computing days in legal proceedings, is by law, days on motions in arrest of judgment *secus*, on pleas in abatement, in which, therefore, an intervening Sunday counts; Lee v. Carlton, 3 T. R. 642. The words "from or after," may mean either; Pugh v. Duke of Leeds, Cowp. 714; Loft. 276; but, *prima facie*, is inclusive; Rex v. Adderley, Doug. 418. Hence, if a submission to an award is *ita quod* it be made six days after the submission, the day of the award is to be taken inclusive; so that if the award be made the day of submission, it is good; Bellayse v. Hester, 2 Lutw. 177. 1593, 1594; Sty. 382. The day of a date of a protection was never counted any part of the year: Norris v. Hundred of Gawtry, Hob. 139. The day of the date of bargain and sale shall not be counted any part of the six months; S. C. Hob. 139. When a computation of days is made from an act done the day is included; Anon. 1 Ld. Raym. 481. A lease *a confectio* takes effect the same day, whether dated or not; Hob. 140.

§ If an act is to be done on a day named, and no hour be mentioned, the law gives to the last hour of that day; Parks v. Crawford, 10 Mod. 376.

## V. RELATIVE TO WHERE NONE IS MENTIONED.\*

## VI. RELATIVE TO WHAT IS, OR IS NOT, A REASONABLE TIME.

PALMER v. MOVENS. M. T. 1813. K. B. 2 M. &amp; S. 43.

A bill of sale of thirty-four parts of a ship, then being in the port to which she belongs, executed by three joint owners, was holden to transfer the property to the vendee at the time of its execution, if at that time a memorandum of such transfer be endorsed on the certificate of registry, and signed by the three, and a copy of such indorsement be delivered to the proper officer on the next day, and afterwards, within a reasonable time (depending on the circumstances), the other owner execute the bill of sale and sign the indorsement, and a copy of the indorsement signed by the four be left with the proper officer.

The Courts will define what is or is not a reasonable time.†

## VII. RELATIVE TO THE STATEMENT OF IN PLEADINGS.

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Tithes.

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\* If no time be mentioned, it is reckoned from the period an event is proved to have taken place; Hob. 140.

† In many cases concerning time, the common law gives a year and a day for a convenient time; Constable's case, 5 Co. 106. a.

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## I. RELATIVE TO THE DEFINITION OF.\*

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## II. RELATIVE TO THE DIFFERENT KINDS OF.

(A) *PRÆDIAL*.†

(B) *MIXED*.‡

(C) *PERSONAL*.§

(D) *GREAT AND SMALL.*

1. *WHARTON v. LISLE*. T. T. 1692. C. P. 3 Lev. 365; S. C. 4 Mod. 183.

Trover of twenty cart-loads of flax; and, on not guilty, a special verdict found that the plaintiff was impropriator of the parish church of Thorpe, in Essex, and the defendant vicar; and that time out of mind, &c. the parson had had all great tithes, and the vicar all the small tithes; and that in the said parish are 650 acres of arable, and 750 of pasture; that 26 acres of arable in the common fields there had been for eight years last past sown with flax by several person; and that before eight years no flax had been sown in the parish; and that the flax in question was sown by several persons, in several parcels, upon twenty-six acres of arable, and the tithes set forth, &c. And if they are great tithes, they find for the plaintiff; and if not for the defendant. Holt C. J., held them great tithes; and he did not allow any other difference but that where flax, hemp, or other such things, are sown or growing in gardens, or backsides, or orchards, &c., they are small tithes; but when they are sown and growing in open fields, they are great tithes, be the quantity more or less. But the three other judges, viz. Dolben, Gregory, and Giles Eyre, held the contrary, and that let the quantity be what it would, yet they are small tithes, although growing in common fields. And though, in the case of *Udal and Tindal*, in Cro. Car. 28. and Hutt. 78. it is admitted that the

It is the nature and not the quality that makes a great or small tithe

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\* Tithes are defined to be a tenth part of the annual produce of the stock upon land, and the labour and industry of the occupiers; 11 Rep. 13. b.; 4 Leon. 47.

† These kinds of tithes are such as arise merely and immediately from the vegetable produce of the land: such as of corn, hay, hemp, flax, grass, fruit, herbs and wood; 2 Inst. 649; Norton v. Clarke, Gwin. 428; Scarr v. Trin. Coll. 3 Anstr. 769; Gibs. Cod. 663; Bally v. Wells, 3 Wills. R. 30; Degge. c. 1. 2. 15; Ayl. Par. Jur. Can. Ang. 506.

‡ Mixed tithes are those which arise not immediately from the profit of the land, but from the produce and increase of animals nourished by the land. As of cattle, sheep, pigs, wool, milk, and eggs; 3 Salk. 347; 1 Roll. Abr. 685; 2 Inst. 649; per Macdonald, C. B. in Scarr v. Trin. Coll., Gwin. 1445.

§ Personal tithes are the profits which arise from the labour and industry of man in some trade or employment, being the tenth of the clear profits, after deducting all expences; as of mills, fish, &c. 3 Salk. 347; 1 Roll. Ab. C. 635; 2 Inst. 649.

|| Where the tithe of any thing is *magnus ecclesiæ proventus*, it is reckoned among the great tithes; where it is *parvus ecclesiæ proventus*, it is reckoned among the small tithes. Thus the tithes of corn, hay, and wood, are great tithes, because they are in general of much greater value than any other species of tithes. The prædial tithes of other less valuable vegetables, such as hops, potatoes, madder, voad, together with mixed and personal tithes are small tithes.

nature should be altered by the quantity; yet *Ow. 74; Co. Pl. 1277; and Cro. Eliz. 467.* in *Biddingfield's case*, that is not admitted; and by the opinion of the said three judges, judgment was given that they are small tithes.

Hence a  
crans and  
clover seed  
are small  
tithes.

2. *WHARTON v. LISLE. T. T. 1671. K. B. Carter, 640.*

In this case it was resolved that acrons and clover seed are small, and not great tithes.

3. *WHARTON v. LISLE. T. T. 1692. K. B. 12 Mod. 41.*

So are flax:

Trover and conversion of several loads of flax. On not guilty pleaded, the jury found the plaintiff impropiator of a rectory, and the defendant vicar of the same; and that about eight years since flax was first sown within the parish; for the first year the parson had tithes of it, for the last seven the vicar had constantly taken them. They find that there were 660 acres sown with corn, and 26 only with flax; that the vicar was endowed with small tithes. The question was, whether flax were great or small tithe?

*Holt, C. J.* The best way to distinguish tithes is the place where they grow: if sown in a garden, they are small tithes; if sown in a field, great: and this rule extends to corn, hops, &c.

But *Eyer, Dolben, and Gregory, Js.* The place is not material; if corn be sown in a garden, the parson shall have it, for flax is a small tithe.

4. *SMITH v. WYATT. M. T. 1742. C. P. 9 Mod. 336.*

Potatoes;

*Hardwicke, Ld.* I am of opinion that potatoes are in their nature small tithes, and that they are not altered by quantity or place.

5. *TIDELL v. WALTER. H. T. 1668. K. B. 1 Mod. 50.*

And wood.

A vicar libelled in the Spiritual Court for tithe of wood. A prohibition was prayed; suggesting that time out of mind they had paid no small tithe to the vicar; but that small tithes, by the custom of the parish, were paid to the parson *Twisden, J.* If the endowment of the vicarage be lost, small tithes must be paid according to the prescription.

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### III. RELATIVE TO THE PERSONS ENTITLED TO.\*

(A) KING, THE.†

(B) LAY IMPROPRIATORS.‡

*JAMES v. TROLLOP. M. T. 1685. K. B. 2 Show. 440.*

A layman  
is not at  
common  
law capable  
of taking  
tithes in  
prender.§

Per *Holt*. It is true a layman is not capable of tithes in prender; but I think a layman is capable of paying and taking a modus in lieu of tithes.

(C) LORDS OF MANOR.¶

(D) PORTIONISTS.\*\*

\* The great tithes, as of corn and hay, are generally payable to the rector or parson; the small tithes to the vicar.

† In places not within any parish, as in forests and the like, the king is entitled to the tithes, because he is not a mere layman, but persona mixta; 2 Rep. 44. a.; 2 Inst. 647.

‡ When the monasteries were dissolved by King Henry VIII., the appropriation of the several benefices which belonged to them would by the rules of the common law have ceased; and they would have become disappropriated, had not a clause been inserted in all the statutes, by which the monasteries were given to the crown, to vest such appropriated benefices in the king, in as ample a manner as the monasteries had held them at the time of their dissolution. Almost all these appropriated benefices have been granted by the crown to lay persons, and are now held by their descendants, or by those who have purchased them from such grantees or their descendants; these are called lay impropiators. The grants made by the crown of this kind of property are either of a rectory or parsonage, which comprises the parish church with all its rights, globes, tithes, and other profits whatsoever; or else of the tithes of a particular tract of land.

§ But may by way of retainer; *Wright v. Wright, 2 Show. 439.*

¶ To entitle a lord of a manor to tithes, it must be by presumption; for, in such a case, it will be supposed that the lord was seised of all the lands comprised within the manor, before the tenancies were derived thereon; and then, by composition or other lawful means, the lord acquired the tithes, paying a certain pension to the parson.

\*\* A portionist is one who has a certain part of the tithes within the parish of another, which is called a portion of tithes; and the person entitled to it is called a portionist; these portions are supposed to be prior to the Council of Luteran, when it was lawful for every person to distribute his tithes, or any portion thereof, to whatever church he pleased, and a portion of tithes does not become extinct by vesting in the same hands with the rectory.

## (E) RECTORS, PARSONS, AND VICARS.\*

IV. RELATIVE TO THE PERSONS, LAND, OR PLACES, [ 48 ]  
WHICH ARE SUBJECT TO, OR EXEMPT FROM.

## (A) OF THE PERSONS.†

HICKS v. WOODSON. M. T. 1693. K. B. 4 Mod. 341.

*Per Cur.* If it be a reasonable custom for the clergy to charge the laity with tithes of such things which of common right ought not to be chargeable, it is as reasonable that a layman may discharge himself by a custom in a place where none have been usually paid.

A layman may by custom be exempt from paying tithes.

\* Tithes are of common right, and were due to the church before the Council of Lateran, though not to any spiritual person in certain; Hob. 296; 4 Mod. 337. When the practice of appropriating the advowsons of rectories or parsonages to monasteries was introduced, the monks usually deputed one of their own body to perform divine service and other necessary duties in those parishes, of which the society were rectors, who were called vicars. But by several statutes it was ordered that such vicars should be secular priests, and sufficiently endowed at the discretion of the ordinary; the endowments were usually of the small tithes, the greater tithes being still reserved to the monastery; from whence arose a new division of tithes into rectorial and vicarial. The rector or parson is *prima facie* entitled to all the tithes of the parish, therefore payment of tithes to the rector is a sufficient discharge against the vicar, because all tithes of common right belong to the rector, and the vicarage is derived out of the parsonage; Guill. 226. Where the vicar produces an endowment, then the situation of the parties is reversed. The *prima facie* title to the extent of that endowment is in favour of the vicar; and if the rector would claim any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him; Gwm. 1526. It has been determined that, if a vicar has for a long time used to take particular tithes or profits, he shall not lose them because the original endowment is produced, and they are not there, for every bishop having an indisputable right to augment vicarages, as there was occasion (and this whether such right was reserved in the endowment or not), the law will therefore presume that this addition was made by way of augmentation; Bunb. 74.

† With respect to persons exempt from tithes, it is a general rule that no layman was capable of having tithes, nor allowed to prescribe generally that his lands were exempt from the payment of tithes; for, without special matter shown, it would not be intended that he had any lawful discharge: therefore, the mere non-payment of tithes, though for time immemorial, does not amount to an exemption, and cannot be pleaded against a spiritual person, without setting out and establishing the causes of such exemption. This rule, that none but spiritual persons may prescribe in non decimando, is however to be understood with several exceptions. First, the king, though not discharged by virtue of his prerogative, being *mixta persona*, is capable of prescribing in non decimando: Hertford v. Leech, Sir W. Jon. R. 337; Compost v. —, Hard. 315. It has been said that, being a personal discharge in the king, if he grants it over, his grantees will not be discharged, but that the prescription is destroyed for ever. So, it has been laid down, that at common law the king's tenants are capable of holding lands discharged on account of his royal prerogative, which renders it beneath his dignity to cultivate them himself; 2 Degge. Ch. 21. 334; Ingolsby v. Uillethorn, Hard. 381; Anon. v. —, Owen, 46; Countess of Lennox's case, 2 Leon. 71; Anon. v. —, Moore, R. 915.

So, lands lying in a forest, and in the hands of the king, may, by prescription, be exempt from tithes, although they are within a parish; but this privilege can only extend, as has been observed, to the king's lessee; and not to his feoffee or patentee; 4 Comin's case, Het. 60; Hotham v. Foster, Gwm. 869; Hertford v. Leech, Sir W. Jon. R. 867; Bannister v. Wright, Sir R. 137; and the lessee must prove the prescription, as otherwise crown lands are not exempt from tithes, the king or his lessees being only capable of such a prescription, without which he is not even discharged of tithes for the ancient demesnes of the crown; 2 Wood, Vin. Sect. 22. 101; Hard. R. 315. Secondly, the lessee, tenant at will and copyholder of a spiritual person, though a layman, in this respect may, by prescription, enjoy the exemption of the lessor, who equally reaps the benefit of his privilege, inasmuch as his rent is proportionably increased thereby, Crouch v. Fryer, Cro. Eliz. 784; Wright v. Wright, Cro. Eliz. 475. 511; 1 Roll. Ab. 653; hence a bishop may prescribe that he and his tenants for life, for years, and at will, as well as his copyholders, have been freed from the payment of tithes; Branche's case, Moore, 219; Bowles v. Adkins, 1 Sid. 320; 1 Roll. Abr. 653; Bishop of Lincoln and Cowper's case, 1 Leon. 248. Nor will an interruption here of the prescription, by a conveyance to a lay person, abolish it. As, the land being discharged of tithes when re-granted to a bishop the prescription revives, Wickham v. Cooper, Cro. Eliz. 216; and a parson having glebe in another parish may prescribe in non decimando for himself, his farmers, and tenants; 3 Com. Dig. Dis. E. 2. Thirdly, the inhabitants of a county, a hundred, or liberty, cannot claim an exemption in non decimando of things de jure titheable; Hicks v. Woodson, 1 Lord Raym. 137; Car. 393; Skin. 560; 2 Salk. 655. Custom, prescriptions by these bodies, or any well-known divisions of a coun-

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- (B) OF GLEBE LANDS.\*  
 (C) OF EXTRA PAROCHIAL PLACES.†  
 (D) OF MONASTERY LANDS.‡

## [ 50 ] V. RELATIVE TO THE THINGS WHICH ARE OR ARE NOT TITHEABLE.

## (A) IN GENERAL.§

ty or district, are allowed, *Croucher v. Collins*, in notes 1 Skund. R. 142; *Nagle v. Edwards*, 3 Anstr. 702; though a parish, 1 Roll. Abr. 653; or a town, 2 Inst. 645; can never prescribe in non decimando; and this rule is so general, that the churchwardens of a parish, who may be considered as holding an ecclesiastical office, possessing lands by prescription, for the repair of their church, cannot prescribe generally in non decimando, not being strictly spiritual persons; 1 Rol. Abr. 653; *Watts. Cl. L.* 507.

\* It is a portion of land belonging to, or parcel of, the parsonage or vicarage, over and above the tithes; and a vicar, therefore, under a general endowment of small tithes, is neither obliged to pay the great tithes of his glebe to the rector, *Blicoe v. Marson*, Cro. Eliz. 489; *Watts. Cl. L.* 505; nor entitled to the small tithes of the Rector's glebe; *Blincoe v. Marson*, Moore, 457; Cro. Eliz. 579; *Dogge*, c. 2. 228; *Gibs. Cod.* 661; *Warden of St. Paul's v. the Dean*; 4 T. R. 73. But if the endowment expressly includes the small tithes of the glebe lands, the rector must pay tithes to the vicar, though the glebe is in his own hands. And where the vicar, who was endowed with the small tithes, sued the rector for the tithe of a mill newly erected on his glebe lands, the court adjudged that such tithe should be paid to the vicar; *Anon. Gwm.* 286. So if the parson's or vicar's glebe is in another parish than where the church is situated to which it belongs, the tithes of such glebe are payable to the incumbent of that parish wherein the glebe lies, unless some exemption is shown; *Seld. c. 6. p. 76*; *Watts. Cl. L.* 505. Where a parson sows his glebe, and dies before it is cut, when his executor severs the corn, the tithe thereof belongs to the successor; for though the executor represent the person of the testator, yet he cannot represent him as parson; 3 Burn's E. L. 415; *Watts. Cl. L. p. 504*; 1 Roll. Abr. 655. But if the parson lives till after severance from the ground, though he dies before the corn is carried off, the successor is not entitled to tithes, because after severance the land was no longer producing it. So also in the case of deprivation or resignation, after the glebe is sown, the successor is entitled to the tithes if the corn was not previously severed; *Moyle v. Ewer*, 2 Bulst. 183.

† As the right of all parochial tithes not appropriated belongs *de jure* to the rector of that parish wherein they arise, so do all extra parochial tithes at the common law in perancy; 2 Inst. 647; 1 Roll. Abr. 657; *Gibs. Cod.* 663. By the canon law tithes in extra parochial places belonged to the bishop of the diocese wherein they arose, as general parson of his whole diocese; *Seld.* c. 11. s. 4.

‡ The exemption claimed as to the payment of tithes on monastery lands would have ceased upon the dissolution of the abbey, and the lands become again subject to tithes, were it not enacted by the stat. 31 Hen. 8. c. 13. s. 21. This statute applies only to the greater monasteries. It has been held, that lands which were held discharged of tithes before time of memory by one of the alien priories, and, coming to the crown on their suppression, were granted to one of the greater monasteries, in whose hands they remained till the dissolution, were no longer exempt; *Penfred v. Groome*, decree of the Exchequer, affirmed by the House of Lords. See 2 Jac. & Walk. 534; and *Page v. Wilson*, 513. In the latter case, the lands had been granted to the monastery by the grantee of the crown. In both cases the lands had not paid tithes since the dissolution. All persons who should come to the possession of the lands of any abbey then dissolved should hold them free and discharged of tithes in as large and ample a manner as the abbey formerly held them. And Sir W. Blackstone says, that from this original have sprung all the lands which, being in lay hands, do at present claim to be tithe-free. For if a man can show his lands to have been such abbey-lands, and also immemorably discharged from tithes by any of the means before-mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites; for abbey-lands, without a special ground of discharge, are not discharged of course, neither will any description *de non decimando* avail in total discharge of tithes unless it relates to such abbey lands. This privilege only extends to the lands of the religious houses, *quandiu propriis manibus excoluntur*, not when in the occupation of their lessees or farmers. And it was formerly held that this exemption applied only to those persons who had an estate in fee simple or fee tail in the land, not to tenants for life; but it has been held that tenant for life under a settlement is entitled to the exemption; *Hett v. Mads*, Gwilll. 1515.

§ We have seen, *ante*, div. I., that the annual produce of the land, the stock upon land, and the labour and industry of the occupier, are titheable. It was formerly held that tithes were only payable of such things as yield to an annual increase; but this rule has been deviated from in the case of some vegetables, which produce a crop only every second or third year, and in case of underwood or coppice, which is only cut once in seven or ten years.



## (B) IN PARTICULAR.

(a) *Acorns*.\* (b) *Aftermath*.† (c) *Agistment*.

SCOLES v. LOWTHER. M. T. 1695. K. B. 1 Ld. Raym. 129.

Powell, J., took exception to the suggestion where the plaintiff suggests Agistment that this barren cattle plough the land, &c., but does not say *per quod* the parson had *uberiores decimas* in another place. And (by him) *uberiores decime* does not signify only that the parson will get better tithes out of the arable land than he would have had if the cattle had not ploughed it; but it signifies that he will have so much more tithes, than otherwise he would have had, as will fully recompense the loss of the tithes of the cattle; or it will (as he expressed it) overweigh that loss. But as to the signification of *uberiores decime* Treby, Ch. J., doubted much.

(d) *Animals feræ naturæ*.§(e) *Apples*.|| (f) *Bark*.¶(g) *Barren and waste land*.

1. WARWICK v. COLLINS. H. T. 1814. K. B. 2 M. &amp; S. 349.

In this case the question was, whether land was exempted for seven years under the proviso in 2 and 3 Edw. 6. c. 13. s. 5? which was part of a forest, To make barren land\*\* ex

It was also formerly held that tithe was only due once in the same year; but it has been determined in two modern cases, that if divers crops are grown on the same land, in the same year, tithe is payable of each of them. It has also been resolved in several cases, that no tithe is due of that which produces another titheable substance but this rule has also been deviated from in modern times.

\* Tithe is payable for acorns; 1 Ro. 100; 11 Rep. 49. a.; 2 Taunt. 64?; If, however, they are not gathered, but left as wild fruit under the tree to be eaten by hogs, no tithe is due for them; Anon. Het. 27; Lit. R. 40.

† It is laid down in several cases that tithe is not due of aftermath, because it was formerly held that tithe could only be due once in the same year from the same ground. But in 33 Charles 2. the Court of Exchequer was of opinion that, of common right, tithes of aftermath, or the after-crop of grass mowed, there being no prescription or custom against or in discharge of the same, ought to be paid. And Dr. Burn says the modern determinations have been that the aftermath of meadow is part of the increase of the same year, and consequently titheable.

‡ And not for cattle which are kept for the plough or pail in the same parish; because the parson has tithe for them in another way. Agistment tithe is not payable for horses kept for husbandry, saddle-horses, coach-horses, or other horses used merely for pleasure. But where coach-horses were used in carrying coals and manure into another parish, an agistment was held to be payable for them. Proof of the endowment of the small tithes is sufficient to support a demand of agistment tithe, although it has never been received before; Bryan v. Booth, 2 Price's Rep. 231. And a vicar proving perception of small tithes (where the rector or impropriator have never received other tithes than those of corn and grain) is entitled to demand tithes of agistment, although such tithes have never before been received by his predecessors, and the documentary evidence adduced in support of his claim refer to small tithes generally, and not to all small tithes; and this, though it appears that a pension or portion is payable out of the vicarage to the superior; Kennicott v. Watson, 2 Price's Rep. 250. For though agistment tithe has not, in most places, been required to be paid till within a recent date, yet the tithe itself is as old as the tithe of hay, and this species of payment may have existed in very ancient times; Williamson v. Lord Lonsdale, Dun. R. 62; 35 Pr. R. 38. Nevertheless, it cannot be claimed under an old grant from the crown, of grain, hay, and herbage, where there does not appear to have been any perception or enjoyment of this specific tithe; Scott v. Lawson, 7 Pr. R. 266.

§ No tithe is due at common law for animals that are *feræ naturæ*; such as deer, rabbits, &c. But, by the custom of many places, some animals of this kind are titheable.

|| Are titheable; 2 Inst. 252.

¶ Bark, lops-tops, and cuttings from trees, are exempt from tithes; Cro. Jac. 100; 1 Roll. Abr. 640.

\*\* By the statute 2 and 3 Edw. 6. c. 16. all barren, heath, and waste ground, which is improved and converted into arable or meadow, shall not pay tithes for seven years after such improvement. Land which is of good natural quality will pay tithe immediately, notwithstanding this statute, although the expense of bringing it into cultivation exceeds the return in the several first years. Warwick v. Collins, 5 M. and S. 166. But an inclosure of common appendant is not exempt from specific tithes from which the land to which it was appurtenant is; Manchester v. Watson, 3 Burr. 1375; 1 Blk. 400. And, indeed, land which is of a good natural quality must pay tithe immediately, although the expense attending the breaking it up and liming it exceeds the return made to the farmer in the several first years of cultivation; Warwick and another v. Collins, 5 Maule, and Sel. 166.

- [ 56 ] (f 1) *Fruit and fruit trees.\** (g 1) *Furze.* † (h 1) *Geese.* ‡ (i 1) *Gosse-berries.* § (j 1) *Grapes.* See *Hot-House Plants*, p. 57. (k 1) *Grass.* || (l 1) *Gravel.* (a) (m 1) *Hawks.* (b) (n 1) *Hay.* (c) (o 1) *Heath.* (d) (p 1) *Hemp.* See *ante*, div. (e) *Flax*, p. 55. (q 1) *Hens.* (e).  
 [ 57 ] (r 1) *Honey.* See *ante*, div. (i) *Bees*, p. 53. (s 1) *Hops.* (f)  
 (t 1) *Hot-house plants.*

ADAMS v. WALLER. Cited Gwm. 1204.

**Hot-house plants seem titheable. g** In this case it was agued on the one side, that the produce of a hot-house is not the produce of the earth; that if tithe is payable for such productions, it must also be for those of pots in a house; or sallad raised on a flannel; and that things, not the produce of the soil and climate, cannot be titheable. On the other side, it was observed that every thing raised in a garden is principally in consequence of manure and labour, and yet titheable; that cucumbers were never objected to; that cherries, walnuts, cabbages, and potatoes, are all exotics; that the expense could be no objection, as it would have excluded cabbages and most other things; and that hereafter the raising of pines may cease to be expensive. In the judgment delivered in the Exchequer,

Skykker, *Ld.*, C. B., said, as to melons, pines, &c. I know not how to draw any line between them and other produce of gardens. What is the tithe of gareens? It is predial. The notion of artificial heat and soil would exclude almost all the produce of gardens. Things raised under glasses are raised in an artificial soil; but they must all be subject to the same rule. Inoculation, to be sure is a work of art; but art and expense used will not make any difference. Eyre, B., added, hot-house plants are certainly not exempt. The like hardships occurred in wastes, madder, &c.; but an act of parliament was necessary to exclude the right of the parson. The general rule is clear; and the inconveniences will suggest mutual moderation; if not, a court of justice cannot help it. Hence we may probably conclude, that the produce of hot-houses, like that of gardens, is *de jure* titheable.

- 1 58 ] (u 1) *Hounds.* (h) (v 1) *Houses.* (i) (w 1) *Iron mill.* (j) (x 1) *Iron ore.* (k) (y 1) *Lambs.* (l) (z 1) *Lead mills.* (m) (a 2) *Lead mines.* (n) (b 2) *Lead ore.* (o)

\* Titheable; 2 Inst. 1649; Gwm. 429; Gibs. Cod. 663; see also particular kinds in this analysis. It has been said, that when tithe is paid for the fruit of trees, if in the same year the trees themselves are cut down and sold, no tithe is due for them; *Baxter v. Hopes*, 2 Inst. This doctrine, however, must be distinguished from the case of *grant v. Hedding*, Hard. 380; where it was decreed that tithe was due, as well from those trees which yield titheable fruit, as from those which produce none; *Herd*, 380; Gwm. 516. So where plants growing in nursery grounds are either given away, or sold for the purpose of being transplanted into another parish, their tithe is due to the tithe-owner of that parish wherein they are reared; *Gybbes v. Wybourn*, Cro. Car. 526.

† Titheable; 3 Keb. 635. Litt. 367; 1 Vent. 75; Sed. 447.

‡ Titheable; Gibs. Cod. 607; Degge, c. 11.

§ Titheable; 2 Inst. 252; 3 Com. Dig. tit. Dis.

|| Titheable; 2 Inst. 647.

a Not titheable; 2 Inst. 651.

b Not titheable; Degge. o. 8. p. 260.

c Titheable; 2 Taunt. 55; 2 Wils. R. 173; 2 P. Wms. 520.

d Seems not titheable; 3 Keb. 635; Litt. 367.

e Titheable; Degge. c. 11.

f Titheable; Hut. 1278; 2 Keb. 36; 1 Sid. 443; Gwm. 856.

g Such as pine-apples, grapes, melons, &c.

h Not titheable; Degge. c. 8.

i Of common no tithe is due for houses or buildings, nor the profit made by the sale of them, nor for any rent reserved upon a demise of any house or building, because here there is no increase, no renewal, either at any stated or different periods; 2 Inst. 660; *Leyfield v. Tysdale*, Hob. R. 10; *Clarke v. Prowse*, Latch. R. 210; Gibs. Cod. 682. Unless by custom; *Wats. C. L.* 486; *Anon. Cro. Car.* 596; *Hob.* 11, see also, post, div. X. p. 83.

j Not titheable, unless a custom to the contrary; Gwm. 977; Cro. Jac. 523.

k Not titheable, in the absence of custom sanctioning it; 2 Inst. 651.

l Titheable; Com. Dig. tit. Dismes.

m Not titheable, unless by custom; Gwm. 977; Litt. Rep. 314.

n Unless by custom, not titheable; 2 Inst. 651.

o Not titheable, unless by custom; 2 Inst. 651.

(c 2) *Lilly flowers*.\* (d 2) *Lime*.† (e 2) *Mallards*.‡ (f 2) *Marl*.§ (g 2) *Marshes*. See ante, div. (b 2) *Fens*, p. 55. (h 2) *Milk*. See post, div. IV. (i 2) *Mills*.|| See also div. particular kinds of mills. (j 2) *Mint*.(a) (k 2) [ 59 ]  
*Nursery gardens*. See ante, div. (f 1) *Fruit and Fruit Trees*, p. 56. (l 2) *Onions*.(b) (m 2) *Paper mill*.(c) (n 2) *Parsley*.(d) (o 2) *Partridges*.(e) (p 2) *Peas*.(f) (q 2) *Pears*.(g) (r 2) *Pheasants*.(h) (s 2) *Pigs*.(i) (t 2) *Pigeons*.(j) (u 2) *Pine apple*. See div. (a) *Hot-house Plants*, p. 57. (v 2) *Plums*.(k) (w 2) *Potatoes*.(l) (x 2) *Quarries*.(m) (y 2) *Rapeseed*.(n) (z 2) [ 60 ]  
*Roots*.(o) (a 2) *Rue*.(p) (b 3) *Saffron*. See ante, div. (e) *Flax*, p. 55. (c 3) *Sage*.(q) (d 3) *Salmon*. See ante, div. (a) *Fish*, p. 55. (c 3) *Sand-pits*.(r) (f 3) *Seeds*.(s) (g 3) *Sheep*.(t) (h 3) *Slate quarries*.(u) (i 3) *Snuff mill*.(v) (j 3) *Stone*.(w) (k 3) *Tares*.(x) (l 3) *Teal*.(y) [ 61 ]  
(m 3) *Teasels*.(z) (n 3) *Thyme*.(aa) (o 3) *Tiles*.(bb) (p 3) *Tin mill*.(cc) (q 3) *Tin mines*.(dd) (r 3) *Tobacco*.(ee) (s 3) *Turf*.(ff) (t 3) *Turnips*.(gg) (u 3) *Turkeys*.(hh) (v 3) *Vegetables*.(ii) (w 3) *Velches*.(jj) (x 3) *Walnut-trees*.(kk) (y 3) *Wax of bees*. See ante, div. (i) *Bees*, [ 62 ]  
p. 53. (z 3) *Wild fowl*.(ll)

\* Titheable; 2 Inst. 252.

† Not titheable, unless by usage; 2 Inst. 651.

‡ Not titheable, unless by custom; Gwm. 631; 1 Wood's D. 209

§ Not titheable, in the absence of a custom; 2 Inst. 651.

|| Mills produce a personal tithe; Gold. Ab. 366; 3 Atk. 18.

Ancient mills, or mills built before the time of memory, of which no tithe has been paid are not titheable. Mills erected within time of memory, the tithe is due; 2 Inst. 621; Wilson v. Mason, Gwm. 974; 3 Wood's Dec. 285; and, by the statute 9 Edw. 2. c. 5. no prohibition is allowed for tithes of new mills built after the statute.

a Not titheable; 2 Inst. 252.

b Titheable; 2 Inst. 252.

c Not titheable, unless by custom; Gwm. 977; 2 Roll. Rep. 84.

d Titheable; 2 Inst. 252.

e Not titheable; Moore. Rep. 599.

f Titheable; Bunb. 169; Gwm. 1526.

g Titheable; 2 Inst. 252.

h Not titheable; Marsh. Rep. 26.

i Titheable; 2 Inst. 649.

j Titheable; Deg. c. 11. p. 264; Gibs. Cod. 607.

k Titheable; 2 Inst. 252.

l Titheable; Com. Dig. tit. Dis.; 2 Inst. 252.

m Not titheable, 2 Inst. 651.

n Titheable; Gwm. 471.

o Titheable; 2 Inst. 252; Com. Dig. tit. Dis.

p Titheable; Ibid.

q Titheable; 2 Inst. 252; Com. Dig. tit. Dis.

r Not titheable, unless by custom; 2 Inst. 651.

s Titheable only where no tithe is taken of the herb or plant thereon; 3 Com. Dig. tit. Dis.

t Titheable; Gwm. 1070.

u Not titheable, unless by custom; 2 Inst. 651.

v Not titheable, unless by custom; Gwm. 977; Litt. Rep. 314; Cro. Jac. 523.

w In the absence of a custom, not titheable; 2 Inst. 651.

x Titheable; Gwm. 584; 3 Anst. 954.

y Not titheable, unless by custom; Gwm. 531; 1 Wood, D. 209.

z Titheable; 1 Wood. D. 391.

aa Titheable; Gwm. 1537.

bb Not titheable, unless by custom; 2 Inst. 651.

cc Unless by custom, not titheable; Gwm. 977; Lit. Rep. 314.

dd Not titheable, unless by usage; 2 Inst. 651.

ee Titheable; Gwm. 1537.

ff Not titheable, unless by custom; 2 Inst. 651.

gg Titheable; 2 Inst. 252; Gibs. Cod. 680.

hh It was formerly supposed that turkeys, being *feræ naturæ*, were neither titheable by their eggs nor young, Hughton v. Prince, Moore, 590; it has, however, been held in a more modern case, that tithe is now due for them, being equally tame with other species of poultry; Carleton v. Brightwell, 2 P. Wms. 463.

ii Titheable; 2 Inst. 252; 3 Wood. D. 372.

jj Titheable; Gwm. 530; 3 Anst. 954.

kk Titheable, by custom; 2 P. Wms. 601.

ll Not titheable; Gwm. 531; 1 Wood, D. 209.

(a 4) *Wood.\**

FORD v. RASCATER. E. T. 1815. K. B. 4 M. &amp; S. 130.

Gros bois  
are exempt.

The question was whether oak wood of more than twenty years' standing, growing, not from acorns, as original or maiden trees, but from old stools, which stools belonged originally to trees which stood more than twenty years, were so clearly entitled to an exemption by the statute, as to make a verdict subjecting them to tithe a wrong verdict; and the Court, after taking time to consider, said, that the exemption, naturally and by legal consequence, embraced whatever constituted a part of *gros bois*, or timber of the requisite age; but it did not comprehend that which never made a part of, or co-existed with, the *gros bois* of the due age, and could not therefore comprehend germens cut before the tree was statutely *gros bois*, nor the wood growing from the stool on which the *gros bois* once stood, but stands no longer, or the germens springing from the root of what was once the root of *gros bois*, but is so no longer.

[ 63 ]

(b 4) *Wood.†*

## (C) WHERE CONSUMED BY THE OCCUPIER.‡

\* Where trees are considered an timber, either by common law or by custom, no tithes are to be paid of the tops or tips of such trees, for whatever use they are cut, with the exception, that in certain peculiar cases, where a fraud is actually attempted, or from necessity to avoid fraud, they may be titheable. After many ineffectual struggles and remonstrances, in consequence of the joint complaints of the great men and Commons, in the parliament of the forty-fifth Edward the Third, a statute was at length passed, exempting from the payment of tithes great wood of twenty years' growth or more, and enacting, that upon a suit commenced in the Spiritual Court of such tithes, a prohibition should be granted, as had been used before that time; Rot. Parl. 17 Ed. 3. Art. 29; 18 Ed. 3. Art. 7 and 9; 21 Ed. 3. Art. 48; 25 Ed. 3. Art. 27; stat. 45 Ed. 3. c. 3; Rot. Parl. 47 Ed. 3. Art. 9; 50 Ed. 3. Art. 141; 2 Inst. 642. In construing the statute, great difference of opinion formerly prevailed. It was long a question how the words *gros bois*, great wood, should be considered, and of what age wood ought to be before it is exempted from the payment of tithe. Lord Coke says, that *gros bois* signifies specially such wood as either has been, or is by the custom of the country, timber; and that all such wood, if of the age of twenty years or more, is free from the payment of tithes; 1 Inst. 642; Fox v. Thexton, 12 Mod. 524. This principle has been since confirmed both by the authorities of Lord Hardwick and Lord Ellenborough. The statute does not import or exempt all wood of twenty or forty years' growth, but such only as comes under the denomination of *gros bois*, or great wood. Two things, therefore, must concur to exclude or privilege wood from a liability to tithes; namely, its being of the specified age of twenty years or more; and its being *gros bois*; Ford v. Racter, 4 M. and Sel. 136; Soby v. Molins, Plowd. R. 470. Our attention is naturally led to enquire what species of wood it is that is thus privileged under the title of great wood. In all countries, oak, ash, and elm of twenty years' growth are considered timber, and therefore as such exempt from the payment of tithe; Dege, C. 4. 214. The exemption is not, however, confined to wood of this description; beech, Layfield v. Cowper, 1 Wood's D. 330; Bilby v. Huxley, Bunb. R. 192; Abbott v. Hicks, 1 Wood's D. 319; Aubrey v. Fisher, 10 East, 18. 446. Beech or buck, from whence the county of Buckingham takes its name, is there always considered as timber; cherry, Chapman v. Barlow, Bunb. 188; Duke of Chandos v. Talbot, 2 P. Wms. 606; holly, Pinder v. Spencer, Noy. 30; aspen, Wright v. Powle, Gwm. 357; horse chesnut, lime, walnut trees, Duke of Chandos v. Talbot, 2 P. Wms. 601; and willows, Guffy v. Pinder, Hob. 219; are by the custom of the country in many places timber.

† Titheable; Cro. Eliz. 702; 3 Burr. 463.

‡ A distinction has been taken by most writers from the application of peas and beans to the sustenance of the occupier and his family. A very learned modern writer states, "that if the occupier gather them green to spend in his house, where they are accordingly eaten by the family; no tithe shall paid of them by the law of the land, without the aid of a local or particular custom to effectuate the exemption; Toller on Tithes, ch. 4. 119. There are, undoubtedly, many authorities in support of this doctrine, and an exemption from the payment of tithes, in consequence of the consumption of the articles in the occupier's family, has upon many occasions been permitted; Hele v. Bragg, Gwm. 861; 1 Roll. Abr. 647; Baldwin v. Atkinson, 4 Wood's Dec. 48; Robinson v. Tunstall, Gwm. 861; Facy v. Long, Cro. Car. 237; Underwood v. Gibbon, Bunb. 3; Rookett v. Gomershall, Litt. 367; Austin v. Lucas, Moore, 909; Tileen v. Walter, 1 Sid. 447; Anon. Gwm. 428.

But it seems doubtful whether an exemption upon such principles would now be permitted. Indeed it has been once held, that a custom to exempt from the payment of tithes, such peas and beans as were gathered green, and used in the family of the owner, in consideration that he should set out the tithes of the residue respectively in cucks and sheaves, at his own expense, was bad; the Court, by entering into the consideration of the custom,

## VI. RELATIVE TO THE MODE OF TITHING,\* AND WHEN IT BECOMES DUE.

### (A) IN GENERAL.

#### 1. BUTLER v. HEATHBY. T. T. 1790. K. B. 3 Burr. 1891.

Per Lord Mansfield, C. J. Notice of setting out tithes is not necessary at common law, though it is by the ecclesiastical.

#### 2. HALLIWELL v. TRAPFES. E. T. 1807. C. P. 2 Taunt. 55.

The Court were unanimous that they could not upon the present occasion go into the question, whether the parson had reasonable time to compare his tithe with the nine parts, as the case did not turn upon that point at the trial; but the law on that subject clearly was, that the tithe must be set out, and the nine parts left so long, that the parson may have an opportunity of judging, by the view, whether the tithe is fairly set out or not.

#### 3. LEATHES v. LEVINSON. E. T. 1810. K. B. 12 East, 239.

A farmer cut the whole of a field of barley lying in the two parishes of A. and B., and after rolling (i. e. cocking) and tithing part in A., proceeded to roll and tithe part in B., and the weather being catching, he carried that part which was tithed in A. the day before the rest of the field in A. was rolled and tithed; and this without previous notice of the intention to carry part. Held that this, being done *bona fide*, was lawful, though by the general rule a farmer may not at his pleasure tithe and carry part of a field of corn which has been cut before the whole be tithed, and then proceed to another field, &c. so as to oblige the parson to come again to the same field at another

implying that there was de jure no such exemption; *Pearse v. Hall*, 2 Wood's Dec. 456; and in the case of *Williamson v. Lord Lonsdale*, in February 1818, in the Exchequer, it was decided, that potatoes and turnips consumed in the family of the grower are liable to tithes; Lord Chief Baron Richards then having said, "I shall get rid of one part of the case, because it is sufficiently clear the defendants claim an exemption from the payment of the tithes of potatoes and turnips if used in the family; and in support of this claim, the case of green peas has been alluded to; but 'as that is a solitary exemption, and as I cannot find a case which says that potatoes and turnips, growing upon different parts of the farm, but consumed in the family, should be exempted from tithes, I am not inclined to extend it further."

\* By the 2 and 3 Edw. 6. c. 13. it is enacted, that all persons shall truly and justly, without fraud or guile, divide, set out, and pay all manner of their predial tithes in their proper kind, as they arise, in such manner and form as hath been of right yielded and paid within forty years next before the making this act, of right or custom ought to have been paid; in and no person shall carry away any such or like tithes which shall have been yielded or paid within the said forty years, or of right ought to have been paid in the places titheable, before he has justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the tithes with the parson, vicar, or other owner or farmer of the same tithes, under pain of forfeiture of treble value of the tithes so carried away. By the second section of the same act, at all times, and as often as predial tithes are due, it shall be lawful for every party to whom the tithes ought to be paid, or his deputy or servant, to view and see the same justly and truly set forth and severed from the nine parts, and take and carry them quietly away; and if any person willingly withdraws his predial tithes, or stops or prevents the same from being viewed, taken, or carried away, by reason of which the said tithe is lost, impaired or hurt; then, upon due proof thereof being made before the spiritual judge, or any other judge, the party so carrying away, withdrawing, letting or stopping, shall pay the double value of the tenth or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expenses in the suit in the same; the same to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws.

† Every person being bound to set out the produce of this land, in order that this may be done with good faith, and without fraud, the Ecclesiastical Court requires that notice should be given to the parson when the tithes are severed. But to do this, it is not necessary that he should have previous notice as to the time of severing them; a custom to set out tithes without the view of the tithe-owner, or by the tithe-owner without the consent of the owner, has been held bad; *Anon. Gwm. 562*. The tithe-owner is entitled to; and must have an opportunity of judging whether or not the tithes are fairly set out; *Broughton v. Wright*, Bunt. 186; *Thomas v. Rees*, Gwm. 796; and even if the occupier justly divides the tithe from the nine parts, and sets it out, but immediately afterwards carries it away, this will be considered as fraud and guile within the statute; *Heale v. Sprat*, 2 Inst. 649. The rules should be reasonable, such as will give the tithe-owner time to attend to the setting out the tithes. An hour's notice is insufficient: in the middle of summer he may be engaged in tithing other fields or farms, perhaps at the extremity of the parish; *Tennant v. Stubbing*, 8 Ant. 640; Gwm. 1441.

Notice of setting out is not necessary at common law, though it is by the ecclesiastical.

[ 64 ]  
The tithe ought to be set out, and nine parts left so long that the parson may judge by the view whether it is fairly set out.

A farmer, though he cannot wait only, may necessarily cut and

[ 65 ]  
tithe part  
of a field,  
and then  
proceed to  
another  
field.\*

time to take his tithes; which general rule, however, being levelled against fraud, vexation, and caprice, must, where these having no application, be understood with all necessary exceptions of partial ripeness and weather, the neglect of which would be prejudicial to the crop; yet there is no rule of law which obliges a farmer (all fraud and vexation apart) to tithe the whole of that part of a field which lies in one parish before he proceeds to tithe any part of the same field lying in another parish.

(B) IN PARTICULAR

(a) *Acorns.*†

(b) *Agistment.*‡

[ 66 ]

(c) *Apples.* See *post*, div. (q) Fruit and Vegetables, p. 68.

(d) *Barley.*

A custom  
that a tithe-  
owner shall  
have the  
eleventh  
part in con

SMYTH v. SAMBROOK, T. T. 1814. K. B. 1 M. & S. 66.

In an action on the stat. 2 & 3 Edw. 6. c. 13. for not setting out the tithe of wheat, burley, oats, peas, and vetches, the jury found a custom throughout the parish for the parson to take the eleventh shock of wheat, and the eleventh cock of barley, &c.; as a consideration for the custom. It appeared

\* In general, all the produce cut down in a field should be tithed before any part of it is carried away. After the tithes are set forth, the tithe-owner or his servants may come and spread abroad, dry, or stack them in any convenient place, wherein they have grown, until they are sufficiently weathered and dried; but he must not take a longer time than is reasonable and necessary for the benefit of his tithe; *Degeo*, c. 14. 273; 1 Roll. Abr. 643. This convenience of time is naturally dependent on the quantity of the crop, the weather, and other circumstances. Where tithe is suffered to remain on land longer than it ought, to the damage and inconvenience of the owner, he may either distrain it as damage feasant, or bring an action on the case, *Mountford v. Sidley*, 3 Bulst. 336; *Gwm*, 424. but he cannot turn his cattle into the field to depasture it in the usual course of husbandry, as he would be thereby making himself the judge in his own cause of what is a reasonable time. And to permit him to put in his cattle and eat it, might be a much greater loss to the tithe-owner, than that which the occupier might sustain by the continuance of the tithe upon the land; *Shapcott v. Mugford, Ltd.* Rayn. 187; *Williams v. Ladner*, 8 T. R. 72. In a later case, *Baron Wood* seems to doubt the occupier's right to distrain tithes, damage feasant; and as it is undecided what time is to be considered a reasonable time for their remaining upon the land, the more prudent remedy seems to be by action on the case; *Biker v. Leathers*, *Wightwick's R.* 113; *et vid.* *Gudol. Rep.* 362. The tithe-owner has a right to carry away his tithes; and if he is obstructed, has his remedy in the Spiritual Court. In ordinary cases he may use the same road which the occupier of the land uses; but he cannot break any rail, gate, lock, or hedge, more than is absolutely necessary for his passage, *Degeo*, c. 14. 274; *Hampton v. Courney*, 1 Bulst. 103; he is not allowed to pass through that road which may be the nearest for the conveyance of his tithes, if prejudicial to the farmer. In collecting the tithes, he is not obliged to unload his waggon before driving it on the ground of each parishioner; for, as the whole tithe of a farm may not load half a waggon, it is but reasonable that he should be permitted to fill it from other farms; *Lake v. Bruton*, *Gwm*, 775.

† The tithe of acorns is payable in the first state into which they can be collected in equal portions after severance from the tree.

‡ In general, where common land is depastured, the owner of the cattle must pay the tithes, the owner of the soil receiving no profit from it; *Fisher v. Leman*, *Bamb.* 3. *in notis*; *Pory v. Wright* *Hard.* 184; and if the parish in which the common lies is not clearly known, the owner of the animal is by express provision of the legislature to render them to the tithe-owner of that parish wherein he lives; 2 and 3 Edw. 6. c. 13. s. 3. The next, and not the least important question on this subject, relates to the quantum that the tithe-owner should receive for the tithe of agistment. Writers, whose names almost carry with them conviction, have held, that the tenth of the total, or of the improved value, should be paid; that is, that when barren or unprofitable animals are sold, the tenth part of the sum total for which they are sold should be given to the tithe-owner of the parish wherein they have been bred; or, that if they have been purchased at a certain age, and are afterwards sold, he should have the tenth of the improved value. But here the good or ill fortune of the farmer, the judgment of the grazier, the skill or ignorance of the butcher, would clearly have too much influence in a question of itself ever vague and uncertain; *Willis v. Harvey*, & *Wood's D.* 196. Besides which, it appears that the improved value of the animal cannot be brought into the estimate, the tithe not being for the animal, but for the value of the tenth part of the herbage eaten by it equally due, therefore, whether the animal improves, or, on the other hand, becomes lean, and even ultimately dies. Where cattle are fattened on a close, as there is no herbage eaten, there can be no agistment tithe due for them, and their improvement cannot be estimated; *Ellis v. Saul*, 1 *Anst.* 342.

that the farmer had always been used to put the sheaves into shocks, and in case of bad weather to open them to dry. Held that the custom was good; but as to the barley, &c. there was no sufficient consideration, it appearing that the farmer only put them into cocks, without doing anything further except that in case of wet weather, before the parson tithed them, he opened the cocks of barley and oats, and put them up again, which was, in fact, for his own benefit. The custom, therefore, as to the barley, oats, peas, and vetches, was held void.

sideration of putting wheat into cocks, and after rain opening them to dry and closing them, is sufficient.\*

## (e) Beans.

SMYTH v. SAMBROOK. T. T. 1814. K. B. 1 M. & S. 75.

Lord Ellenborough, C. J., and Bayley, J., held, as to peas and beans, that it is the duty of the occupier to collect them into cocks, which seems to be the first stage in which they are titheable; and that the mere putting them into wads, which is little more than severing them from the root, is insufficient.

Beans and peas are titheable in cocks.

See *Smith v. Sambrook*, 1 M. & S. 75.

(f) Cabbage. See *post*, div. (q) Fruit and Vegetables, p. 68.

(g) Calves. See *post*, div. (k 1) Young Beasts, p. 71.

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(h) Carrots. See *post*, div. (q) Fruit and Vegetables, p. 68.

(i) Clover, &c.†

(j) Coleseed. See *post*, div. (f 1) Seed, p. 71.

(k) Colls. See *post*, div. (k 1) Young Beans, p. 71.

## (l) Corn.

SHALLCROSS v. JOWLE. T. T. 1815. K. B. 13 East, 261.

Per Lord Ellenborough, C. J. Corn must be tithed in the first convenient state in which the tithe can be collected after the corn is cut, which is in sheaves; and if the farmer adopt any mode of tithing which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad.

Corn is titheable in the sheaf.‡

(m) Ducks. See *infra*, Fowls.

(n) Eggs. See *infra*, Fowls.

(o) Flax, Hemp, &c.

(p) Fowls.¶

(q) Fruit and Vegetables.¶

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\* In many counties, barley and oats are never collected into the sheaf; they are then titheable in the cock, which is the first state in which they become of equal size, so as to be capable of comparison, and not in the swath, from which it is impossible to collect the right proportion; as custom supersedes the common law in obliging the occupier, in many cases, to render his corn to the tithe-owner in some ulterior process, or to advance it another stage in the course of husbandry, so will custom also allow him an adequate consideration for his trouble.

† Clover, tares, vetches, and lucern, are titheable in the same manner as hay, as well therefore in their second as in their first crop; *Collyer v. Howes*, 3 Amstr. 954; *Pomfret v. Lander*; Gwm. 580; *Wallis v. Pain*, Burr, 344; *Witherington v. Harris*, Gwm. 584.

‡ Where, however, tithe corn has been paid in any other manner, such as by gathering the sheaves into shocks, *Archbishop of York v. Sir M. Stapleton*, 2 Atk. 136; or making them into cocks, *Wats. C. L.* 540; the custom must be observed and in that manner it must still be paid; *Degge. c. 3.* 235. Hence a custom of putting sheaves into shocks, and after a rain opening them to dry is sufficient; *Smith v. Sambrooke*, 1 M. & S. 66.

§ By 11 and 12 W. 3. to encourage its growth, it is enacted, that any person sowing hemp or flax shall pay to the tithe-owner the sum of 5s. yearly, and no more, for each acre of land so sown, before the same is carried off from the ground, for the recovery of which the tithe-owner has the usual remedy at law; 11 and 12 Will. 3. c. 16; 1 Geo. 1. st. 2. c. 26.

¶ Fowls, such as hens, geese, ducks, and pigeons, are either titheable in the eggs, or in the young, according to the custom, but not in both; *Degge. c. 11.* 264; 1 Roll. Abr. 635; 642; *Hait v. Hill*, 3 Keb. 705; *Giba. Cod.* 607.

¶ Of common right tithes are due for herbs, roots, vegetables plants, fruits and flowers, under which head may be classed parsley, sage, onions, potatoes, cabbages, carrots, turnips, annis, mint, rue, apples, gooseberries, pears, plums, cherries, currants, lily-flowers, and the like, all of which are small tithes, and may be demanded in kind, even where they are gathered by some other person than the owner, unless stolen, though, in most places, some pecuniary consideration is generally given in lieu of them; 2 Inst. 252; *Giba. Cod.*

(r) *Geese.* See *ante*, div. (p) *Fowls*, p. 67.(s) *Grass.*

NEWMAN v. MORGAN. T. T. 1803. K. B. 10 East, 5.

Grass must  
have been  
tedded pre-  
vious to put-  
ting into  
cocks.

Case brought by the plaintiff, as occupier of certain lands in the parish of Hornchurch, in Essex, against the defendant, as farmer of the tithes of the same parish. The first count stated that, after the occupiers of lands in the same parish had gathered the tithes of grass growing thereon into heaps, the rector, after notice, had been used to make the same into hay. That the plaintiff had mowed rye-grass and clover at the time mentioned in the declaration, and gathered the tithes into heaps, and gave notice thereof to the defendant, who neglected to make the same into hay, but permitted it to rot on the ground, whereby the plaintiff was damaged, &c. A second count charged the defendant with neglecting to take away the tithes of hay from the plaintiff's ground after the same had been duly set out, and notice given to him by the defendant, &c. At the trial before Heath, J., the plaintiff's counsel, in opening the case, stated that the tithes had been set out from the swath in grass cocks, when the learned judge said that, if such were the fact, he should nonsuit the plaintiff, for the plaintiff ought first to have tedded or made the grass into hay; and a witness, who was afterwards called for the plaintiff, proving that the tithes were set out from the swaths into grass cocks, without any tedding or making of the same, the plaintiff was nonsuited.

Lord Ellenborough, C. J. If from the state of the weather, and the condition of the grass, tedding were not necessary before it was put into grass cocks, the plaintiff should have shown that; but as no evidence of that kind was offered, we must take the fact to be, that the usual method of treating the grass after it was cut, by tedding it before it was put into grass cocks, in the common process of making it into hay, was proper to have been pursued in the present instance, and that it was not done.

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(t) *Hay.*

HALLEWELL v. TRAPPES, T. T. 1809. C. P. 2 Taunt. 57.

Hay is tithe-  
able in  
grass.\*

The Court said, in this case hay is titheable in grass.

(u) *Hens.* See *ante*, div. (p) *Fowls*, p. 67.(v) *Herbs.* See *ante*, div. (q) *Fruit and Vegetables*, p. 68.(w) *Hops.*

KNIGHT v. HULSEY. M. T. 1798. K. B. 7 T. R. 86.

At common  
law hops  
are titheable

Action by the plaintiff, as the occupier of a certain close in the parish and rectory of Farnham, against the defendant, the farmer of the tithe of hops 680; 3 Com. Dig. tit. Fla. H. H. 10; Claver v. Pullen, 1 Wood's Dec. 212; Stiles's case, Lit. R. 147; Chapman v. Barlow, Banb. 184. The tithe of potatoes and turnips must be set out in any state wherein the the tithe-owner is enabled to arrive at a fair and just comparison of his portion; the occupier is not obliged to bestow more labour than the nature of the thing requires for the benefit of the parson, if the farmer does not put them into heaps for himself, a Court might perhaps hold that he need not do so for the tithe-owner; Newman v. Morgan, 10 East, R. 11. 12. But ridges and furrows are generally unequal in a field, and the fairest way seems to be to set them out in heaps of equal magnitude on the spot where they are dug; tithing them by the single potato or turnip is liable to fraud; a great difference generally exists in the size of each, and the occupier is not allowed to bring them home, and there measure them for the tithe-owner; Beaumont v. Shilcot, Gwm. 945; Bosworth v. Limbrick, Gwm. 1101. For history of potatoes, see a curious note in Gwm. 1216.

\* Which having been once tedded, or fairly thrown abroad from the swarth, it may then, but not till then, be collected into cocks and tithed; Newman v. Morgan, 1 Camp. N. P. 805; 10 East, R. 5. Indeed, Mr. Justice Le Blanc said that it cannot be tithed in the swarth; but after it is tedded and divided into grass cocks, when the tenth part may be properly distinguished from the rest, it is then titheable, though it may be more convenient in many instances to put it first into hay cocks; but that can only be done by consent; Shallcross v. Jowles, 13 East. 268. The whole ground must in that stage be fairly cleared; and a custom to put it into cocks without raking round them is therefore void, Staughton v. Hide, Gwm. 566; Howard v. Bovingdon, 4 Wood's Dec. 546; Franklyn v. Gooch, Gwm. 144; 3 Anstr. 682; Tyler v. Bearblock, before the Master of the Rolls in 1822; and before Wood, B. Essex Spring assizes, 1822; and this tithe must be paid notwithstanding beasts of the plough, or pail, or sheep, are fed therewith; Webb v. Warner, Cro. Jac. 47.



within the same, for not taking away the tithe which was duly set out by the plaintiff. The second count stated that the plaintiff set out the tithe according to the usage and manner of tithing hops there. The plaintiff's witnesses proved at the trial that, when the rows of hops were unequal, as they were in the present instance, the tithe, as far back as living memory had reached, had been set out in this parish (except where a composition had been paid, which in general had been the case) by the tenth hill, the binds being left uncut, and the poles standing; and the relation of several old people, now dead, was given in evidence to that effect; that according to that rule the tithes had been set out, and with peculiar advantage to the defendant in the manner of doing it; that the proper notice had been given to the defendant, who had neglected to take the tithe away. The Court held that the common law mode of tithing hops could not be altered by custom.

(x) *Lily Flowers*. See *ante*, div. (g) Fruit and Vegetables, p. 68.

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(y) *Milk*.† (z) *Mills* ‡

(a 1) *Peas*. See *ante*, div. (e) Beans, p. 66.

{b 1} *Pears*. See *ante*, div. (g) Fruit and Vegetables, p. 68.

(c 1) *Pigs*. See *post*, div. (k 1) Young Beasts, p. 71.

(d 1) *Plums*. See *ante*, div. (g) Fruit and Vegetables, p. 68.

(e 1) *Potalocs*. See *ante*, div. (g) Fruit and Vegetables, p. 68.

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(f 1) *Seeds*.§

(g 1) *Turnips*. See *ante*, div. (g) Fruit and Vegetables, p. 68.

\* It was formerly held that the *modus exponendi*, or mode of setting forth this tithe, may differ in different parishes, and that any manner by which the tithe-owner can conveniently receive the tenth of the produce of the hop grounds must be sufficient; *Ledger v. Langley*, 1 Sid. 283. It seems, however, now perfectly settled, that the regular and usual mode of tithing hops is by taking the tenth measure after they are picked, and before they are dried; *Bate v. Spracking*, Bunb. 20; *Bliss v. Chandler*, 2 Wood's D. 146; *Stedman v. Lye*, 1 Ld. Raym. 504; 1 Roll. Abr. 644. This was quite consonant to the rule that has been laid down for taking other predial tithes, namely, that the article is to be collected in the earliest stage, when the tenth part can be fairly and visibly distinguished from the other nine. In an old case, where an ancient usage was said to prevail in the parish, that the tithe-owner was obliged to accept the tithe hops by the tenth pole or hill after the vines were severed from the ground and stripped from the poles, an issue was sent to the jury; but the custom was pronounced bad; *Sneyd v. Unwin*, 2 Wood's Dec. 403. In two latter cases, where this point was again argued, it was also held that the tithe ought to be set out after the hops are picked from the bind or stem; *Tyers v. Walton*, Gwm. 841; *Sneyd v. Unwin*, 2 Wood's Dec. 447. *in notis*; Gwm. 775.

† Milk is *per se* titheable, and not due by way of commutation for the food eaten by the cow; *Wordsworth v. Bates*, cor. Richards, C. B. in *Gray's Inn*, sitting after Trinity term, 1821, M&S. Where there is no particular usage or custom, the occupier is obliged to pay *de jure* the whole meal of every tenth morning, and his whole meal every tenth evening, and not the tenth part of the produce of all cows each morning and each evening as they come to be milked; to milk the cows at the usual place of milking into his own pails; and the tithe-owner must carry it away from the milking place in his pails in a reasonable time. If he does not fetch it before the next milking time, the occupier is justified in pouring the milk upon the ground, because he then has occasion for his pails. As the produce of the evening's milk is always less in quantity than the morning's, they are considered as distinct titheable matters, from each of which the tenth is counted. The parting with two successive meals in one day may be a great inconvenience, but this may not often happen, and can never be the case where the cows are first milked in the evening; *Callimore v. Bosworth*, 7 Bro. P. C. 57. 2d. edit, by Tomlins; *Bosworth v. Limbrick*, Gwm. 1101; 4 Wood's Dec. 24. But if there is any custom in a parish respecting the manner of tithing milk, such as carrying it to the church porch, parsonage house, or elsewhere, it must be observed by the parishioners; *Dodson v. Oliver*, Bunb. 73; *Hutchins v. Full*, 4 Wood's Dec. 155; *Carthew v. Edwards*, Amb. 72; *Morgan v. Neville*, Gwm. 1046.

‡ The tithes of mills, being personal tithes in every respect except as to the person to whom they are payable, are in all other points subject to the rule respecting personal tithes due to the tithe-owner of that parish wherein the mill is situated; payable once in the year by the stat. Edw. 6., at or before the feast of Easter, out of the clear profits, after deducting all the expenses incident to and on the mills; *Hall v. Machet*, 3 Anst. 915.

§ The tithe of seeds is a small predial tithe, and payable only when no tithe is taken of the herbs or plants themselves; 3 Com. Dig. tit. Dis. H. 10.

(h 1) *Vegetables.* See *ante*, div. (g) *Fruit and Vegetables*, p. 68.

(i 1) *Wood.\**

(j 1) *Wool.†*

(k 1) *Young Beasts.‡*

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## VII. RELATIVE TO THE MODUS IN LIEU OF.

### (A) DEFINITION. §

\* In setting out the tithe of wood, which is *de jure* a great tithe, *Reynolds v. Greene*, Gwm. 1573; 2 Bulstr. R. 27, it is sufficient, if there be no custom or usage, to collect it into loose heaps or boughs; but if there be any usage in the parish, it must be particularly attended to; and if it has been customary to bind it up before setting it out; *Gee v. Perch*, Gwm. 581. or to count the 10th saggot or billet; *Degge*. c. 4. 246. such custom must be observed.

† In some places the tithe of wool is paid by the fleece; *Wilson v. Wilkinson*; Stra. 783; in others by the pound.

‡ The tithes of calves, colts, lambs, and pigs, are small mixed tithes, payable as soon as the animals are weaned, and capable of living on that food by which the mother exists; *Newman v. Morgan*, in *notis* in *Campbell's N. P. R.* 308; *Croft v. Blake*, Gwm. 530; *Degge*. c. 6. 256; *Reignolds v. Vincent*, Bunb. 133; *Jenkioson v. Royston*, 1 Dan. R. 128; 5 Pr. R. 510; Com. Dig. tit. Dismes, H. 6. But though neither the owner can compel the tithe-owner to accept, nor the tithe-owner oblige the occupier to set out these tithes until they are able to subsist without their dams, yet the right to the tithe vests at the time when the animal is dropped. The tithe of these animals is to be paid to the tithe-owner of that parish where the young are engendered, brought forth, and nourished; *Poph.* 197; but if they are not produced in the parish where the mother has been usually kept and fed, the tithe-owner of the parish in which they are produced has perhaps the right of tithe; *Wright v. Elderton*, Gwm. 607.

§ A *modus decimandi*, commonly called by the simple name of *modus* only, is where there is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as twopence an acre for the tithe lands; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay and not the tenth, in consideration of the owner's making it for him; sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity, as a couple of fowls instead of tithe eggs, and the like; any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing. Distinctions have been made in *moduses* relative to the lands over which they extend. A general custom prevailing throughout a parish or district is called a parochial *modus*. A prescription, confined to a farm, is called a farm *modus*.

The former extends to all tithes within a certain district, even over lands inclosed within time of memory, and to articles that are of modern introduction; the latter is more confined, and does not extend either to articles recently introduced, or to newly inclosed wastes or commons; *Scott v. Allgood*, Gwm. 1369; *Moncester v. Watson*, 3 Burr. 1375; *Heaton v. Cooke*, Wigt. R. 282; *Bishop v. Chichester*, Gwm. 1323. A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his prerogative is discharged from all tithes. So a vicar shall pay no tithes to the rector, nor the rector to the vicar, *for ecclesia decimas non solvit ecclesie*. But these personal privileges (not arising from, or being annexed to, the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes; but see 3 Com. Dig. 510. where it is said on the authority of *Owen*, 46; 2 Lev. 71; *Mod.* 915; and *Hard.* 382. that lands shall be exempted in the hands of the king's tenants, if the freehold be in the king, who cannot in regard to his dignity occupy them himself; though in their own occupation their lands are not generally titheable. And, generally speaking, it is an established rule, that in lay hands *modus de non decimando non valet*. But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes, by various ways; as, 1. By real composition. 2. By the pope's bull of exemption. 3. By unity of possession; as when the rectory of the parish, and lands in the same parish, both belonged to a religious house, those lands were discharged of tithes by this unity of possession. 4. By prescription, having never been liable to tithes, being always in spiritual hands. 5. By virtue of their order; as the knights templers, cistercians, and others, whose lands were privileged by the pope, with a discharge of tithes; though upon the dissolution of abbeyes by Henry VIII. most of these exemptions from tithes would have fallen with them, and the lands become titheable again, had they not been supported and upheld by the statute 31 Hen. 8. c. 13. which enacts, that all persons who should come to the possession of the lands of any abbey then (this adverb must be understood to refer to the abbeyes dissolved by that statute, and not to those) which might be at that time dissolved; for it has been determined, that the statute 31 Hen. 8. does not extend to lands belonging to the abbeyes dissolved by 27 Hen. 8. c. 28; which, there-

## (B) REQUISITES OF.

(a) *Must be certain.*

## 1. BURWELL v. COATBS. E. T. 1723. Ex. Bunb. 129.

The defendant insisted upon a modus of four shillings payable at Easter, in lieu of tithe hay arising on his farm and other lands particularly set forth; but *Per Cur.* This is a void modus, because it may introduce a fraud; for if a farmer should turn all his arable land into meadow, he would be discharged of the whole for four shillings; besides, it is too uncertain, it not being certain what a farm consists of.

## 2. STARTUP v. DODDRIDGE. E. T. 1704. K. B. 2 Ld. Raym. 1158.

Holt, C. J., said, that the Court were unanimously of opinion that a custom to pay two shillings in the pound on the true improved yearly rent of land, in lieu of tithes, was void.

## 3. TULLY v. KILNER. H. T. 1722. K. B. Bunb. 126.

The defendant insisted upon this modus. That the occupiers of ancient tenements within particular villis or townships (expressed) within the said parish with their own carts, carriages, and horses, led and carried, and ought to lead and carry, a cart-load of peat and turf from Ulverston Moss to the parsonage-house, for the use of the parson and rector, his farmer or his deputy, on such a day, or within the space of every two years, as they have or should require the same, in full discharge of all the tithe, of hemp, flax, and hay, growing or arising on the said ancient tenements. This was held to be a void modus by three barons (absente Lord Chief Baron Mountague); for a cart-load is too uncertain. It may be drawn by two or six horses; and there is no right of turbary alleged in the parsonage-house, or in the defendant's ancient tenements.

## 4. BUNKLOW v. EDMUND. M. T. 1731. Ex. Bunb. 307.

In this case several moduses were shown. The first was a modus of an half-penny for each calf, in lieu of calves payable on Wednesday before Easter; this was admitted by the defendant, and established. The second was a smoak-penny, in lieu of fire wood burnt in their respective houses, which was also admitted and established. The third was an half-penny on sheer day, for the wool of each sheep dying between Candlemas and sheer day, which was likewise admitted and established. The fourth was four pence per month, payable on sheer day, for the tithe of wool of every hundred sheep shorn in the parish which were brought into it after the second day of February. As to this, it was objected for the defendant, that the witnesses differed in their evidence as to the time of payment, one proving it to be payable about Easter, the others a few days after sheering day; but, notwithstanding this objection, it was established, the defendant having no proofs in the cause.

wool of every 100 sheep in the parish; three eggs for every cock; a smoak-penny in lieu of fire-wood; have been holden good.

## 5. FINCH v. MAISTERS. H. T. 1723. Ex. Bunb. 161.

Defendant insisted upon a modus of 26s. 8d. for hay, small tithes, and fore, still remain liable to pay tithe; see *Lydowne v. Holme*, Cro. Car. 422; dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbots themselves formerly held them; and from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe free. for, if a man can show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before-mentioned; this is now a good prescription *de non decimando*. But he must show both these requisites; for abbey lands without a special ground of discharge, are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands.

\* And invariable, for payment of different sums will prove it to be no modus, that is, no real composition, because that must have been one and the same from its first original to the present time.

† For a certain duty, like the payment of tithes, the recompence should appear equally certain. Thus, where a modus of 8d. was claimed by the occupier of every oxgang of land, which oxgang was said to contain sixteen or about sixteen acres of arable, meadow, and pasture land, in lieu of the tithe of hay arising on the said oxgang, the modus was set aside upon the principle of its uncertainty; *Gwm. 1339.*

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The modus must be certain,\* therefore a modus of 4s. payable at Easter in lieu of the hay of a farm is void.

So, to pay 2s. in the pound on the true improved yearly rent of the land is void.† And a modus to carry a cart load of peat and turf to the parsonage house in discharge of certain tithes is also void.

But a modus of a half-penny for each calf in lieu of calves on Wednesday before Easter; half penny in lieu of wool on the sheer day for each sheep; 4d. a-month for the tithe of fire-wood;

So, 11. 6s. 1 8d. for hay,

small tithes and Easter offerings, for an ancient tenement containing 600 acres, was deemed good. Easter offerings, for an ancient tenement called Brynn and Grass Wood, containing 625 acres. It was objected for the plaintiff that, it appearing by the proof in the cause that this payment was for hay (as a small tithe), therefore hay made from grass being in its nature a great tithe, it must be intended that this hay-penny was for something else, and the ancient import of the word hay or haw was an hedge or small inclosure belonging to an house; it was also objected to this and the other *modus* that they were uncertain, could not be supposed to have a reasonable commencement, and that they were liable to fraud; for if all the land was turned into meadow, it would pay one penny: but notwithstanding the objections, both these *moduses* were allowed by the Court.

(b) *Must be beneficial to the tithe-owner.*

HALL v. MALTBY. M. T. 1819. Ex. 6 Price, 285.

The thing given in lieu of tithe must be beneficial to the parson. On the question whether a custom that the land-owner should take the best out of every ten lambs, and the tithe-owner the next best, is a valid custom; Richards, C. B., said: this is not a *modus*; it is, if any thing, a manner of paying tithes in kind, for it proposes to the parson to take one in ten; but it is a departure from the legal course of rendering tithes. It is not more beneficial to the parson. On the contrary, there is no consideration for the custom moving to the tithe-owner, nor is there any provision made under the custom as stated for any lambs under or above the number of ten.

See Laying v. Yarborough, 4 T. R. 383.

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(c) *Must be different from the thing compounded for.*

1. BUNKLOW v. EDMONDS. M. T. 1731. Ex. Bunb. 307.

It must be something different from the thing compounded for. *Modus.* That tithe milk ought to be paid by every tenth evening and morning's meal in kind from Hoe Monday to the second day of November, to commence upon the evening of Hoe Monday (i. e. the Monday fortnight after Easter day), and the morning following to be taken by the rector at the place of milking, and no tithe milk to be paid for the residue of the year.

*Per Cur.* This is void upon the face of it, being only a payment of part of the whole.

2. SHEPHERD v. PENROSE. E. T. 1678. K. B. 1 Lev. 179.

Unless there be a custom; thence a *modus* to pay a certain portion of fish taken in the sea less than a tenth due by custom, is valid. Prohibition for staying a suit in the Ecclesiastical Court for tithes of fish taken in the sea, and for tithes of corn; where the question was, whether the twentieth fish was payable in satisfaction of all sheaf corn? And by the Court, tithes of fish are not due without custom, and therefore a custom to pay less than a tenth part may be good; but of corn the tenth part may be due of (common) right, and therefore a custom to pay nothing is not good without other matter; but they granted the prohibition, as to the whole, nisi, with intent to hear what the other party had to say.

3. SMYTH v. SANBROOK. M. T. 1813. K. B. 1 M. & S. 66.

So, an immemorial usage to take the eleventh mow or shock of wheat in lieu of tithes is not good, because that is an advantage to the parish only; but to repair the chancel is a good *modus*, for that is an advantage to the parson. An immemorial custom was shown for the rector to take the eleventh mow or shock of wheat, consisting of six or nine sheaves, which the farmer used to put in shocks, and in case of bad weather, to open them to dry; and the eleventh cock of barley and oats, which was merely put into cocks, without doing any thing further, except in the case of wet weather opening the cocks and putting them up again. It was adjudged that the tithe-wheat, which is at

\* And not for the emolument of third persons only; thus a *modus* to repair the church in lieu of tithes is not good, because that is an advantage to the parish only; but to repair the chancel is a good *modus*, for that is an advantage to the parson.

† Therefore, one load of hay, in lieu of all tithe hay, is no good *modus*; for no person would *bona fide* make a composition to receive less than his due in the same species of tithe, and therefore the law will not suppose it possible for such composition to have existed.

‡ Nor does the rule extend to cases where, though the compensation is of the same nature with the thing compounded for, it is rendered in any ameliorated or ulterior state. Thus, a *modus* whereby in consideration that the parishioner made the grass grow in a particular place, and then paid the tithe by way of discharge for the payment of the balks or hedges, 1 Wood v. Symons, Flet. R. 147; or that he has cut, dried, and shocked the corn, in lieu of the payment of tithe-hay the following year, have each been held good and valid *moduses*.

common law titheable in the sheaf, was uniformly advanced to a further stage of labour, by being put into shocks, by which it was better protected from the weather; and that this benefit, together with the additional labour by the farmer, for the benefit of the rector, which the rector must otherwise take upon himself, constituted a good consideration for rendering the eleventh, instead of the tenth, shock of wheat. But in the case of barley and oats, where it was only put into cocks, the additional labour of casually opening them, in the event of wet weather, did not amount to an equivalent for the deduction claimed. The mere labour of ventilation was too uncertain and minute to warrant a departure from the common law, and the mere probability of extra trouble is not a sufficient consideration to warrant the custom.

(d) *Must not be for one thing in discharge of another.*

MORTON v. BRIGGS. M. T. 1671. K. B. Lutw. 1037.

In this case the moduses were three halfpence for every cow having a calf, up to the number of five cows; for five cows having calves, 1s. 4d.; for six cows having calves, 2s. 6d.; for ten cows having calves, 2s. 8d.; and for every cow having no calf, 1d.; and for every milch cow, 1d.; in satisfaction of all the tithes of cows, calves, and herbage and pasture of their lands within the parish, have been all held void moduses, upon the principle, that a payment for one species of tithe can be no discharge for the payment of another.

(e) *The recompence must be as lasting in its nature as the tithe discharged by it.*†

(f) *Must not be too large.*

1. STARTUP v. DODERIDGE. 11 Mod. 60.

*Per Cur.* If a modus be unreasonably large, it cannot be sustained.

2. LAYNG v. YARBOROUGH. M. T. 1809. K. B. 4 Price, 383.

*Per Cur.* One shilling for every tenth fleece, in lieu of the tithe of the ten fleeces rank, is bad. By Wood, B., *aliter*.

3. FRANKLYN T. MASTERS OF ST. CROSS. T. T. 1721. Ex. Bunb. 78.

The first modus insisted upon was 12d. for a milch cow, and the second was sixpence for every calf killed and sold. These were both then adjudged to be void, the moduses being too rank; the first being above half the value of

The modus must not be for one thing in discharge of another\*

The modus must not be too large.†

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Hence 1s. for every tenth fleece in lieu of the tithe of the ten fleeces;  
Or 12d. for

\* Thus a modus of 1d. for every milch cow will discharge the milk kine, but not the barren cattle; for tithe is of common right due for both, and therefore a modus for one shall never be a discharge for the other.

† The recompence must be in its nature as durable as the tithes discharged by it, that is, an inheritance certain; and therefore a modus that every inhabitant of a house should pay 4d. a-year in lieu of the owner's tithes, is no good modus for possibly the house may not be inhabited, and then the recompence will be lost; Gwm. 676; Cro Eliz. 129. Nevertheless an annual payment of 1d. by each occupier of lands in the parish for tithe of hay has been held a good modus; Bennet v. Read, 1 Anst. 322; Tearce v. Elston, 1 Anst. 308; 18 Ves. 176. The distinction seems to be this; a payment by the inhabitants of certain houses is a bad modus because houses may decay, and not be rebuilt, or they may be uninhabited, and the modus depending on their existence may be objected to for want of certainty of duration: but as it is not likely that a town or village will ever be wholly without inhabitants, a modus to be paid by the inhabitant householders within a town or village is sufficiently durable and on that account may be good; Bennet v. Read, 1 Anst. R. 329.

‡ The modus must not be too large, which is called a rank modus, as, if the real value of the tithes be 60l. per annum, and a modus is suggested of 40l., this modus will not be established though one of 40s. might have been valid; indeed, properly speaking, the doctrine of rankness, in a modus is a mere rule of evidence drawn from the improbability of the fact, and not a rule of law, for in these cases of prescriptive or customary moduses it is supposed that an original real composition was anciently made, which being lost by length of time, the immemorial usage is admitted as an evidence to show that it once did exist, and that from thence such usage was derived. Now time of memory has been long ago ascertained by the law to commence from the beginning of the reign of Richard the First, and any custom be destroyed by evidence of non existence in any part of the long period from that time to the present; wherefore as this real composition is supposed to have been an equitable contract, or the full value of the tithes at the time of making it, if the modus set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this modus is, (in point of evidence) *felo de se*, and destroys itself; for, as it would, be destroyed by any direct evidence to prove its non-existence at any time since that era; so, also, it is destroyed by carryng in itself this internal evidence of a much later original.

each milch cow; 6d. for every calf killed and sold;

And 2s. in the pound on the improved yearly rent, are void.

the milk at the time the modus was supposed to commence; and the second, if ten calves were sold, five shillings must be paid, which is in effect for one calf, for the tithe is one in ten.

4. *STARTUP v. DODDERIDGE*. E. T. 1691. K. B. Salk. 557.

A modus to pay 2s. in the pound of the improved rent in lieu of all tithes was held nought, for that is to rise and fall as the land is let, and the parson cannot know it; and, though a custom to pay the double value for a fine may be good, yet that rises to a man's contract, which shall never be void; where it may be reduced to any certainty, and differs from this case of a modus, which ought to be ascertained as the duty, which is destroyed by it.

Holt, C. J., *dubitante* upon a motion for a prohibition. The modus was also held void on application to the Common Pleas and Exchequer. *Vide* the report in Lord Raymond. The same modus was likewise held bad, 1 *Ld. Raym.* 696. *Vide* 3 *Atk.* 245; *Burn. Ecc. Law*, 421.

(2) *How discharged.\**

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(C) VALIDITY OF, BY WHOM AND HOW QUESTIONED.

1. *PYKE v. DOWLING*. T. T. 1760. K. B. 2 *Blac.* 1257.

The validity of a modus is triable by the Court;

Case from the Court of Chancery. The plaintiff, Robert Isaac Pyke, as vicar of Chew Magna, in the county of Somerset, is entitled to all the tithes of the parish of Chew Magna, and the hamlet and chapelry of Dundry (except the tithe for some ancient demesne lands, called Over-lands,) or to certain moduses for the same and in lieu thereof. The defendant, Dowling, is the owner and occupier of a certain farm and lands within the said vicarage and chapelry, or the titheable places thereof, and hath raised and kept many lambs upon his said farm, and sets up a modus of two shilling and sixpence to be paid to the vicar of the vicarage aforesaid, on the 5th day of April in each year, being Lady-day, old style, in lieu of every tenth lamb in kind. The question for the opinion of the Court is, whether such modus of two shillings and sixpence for every tenth lamb, to be paid on the 5th day of April in each year, is a good modus or not?

The certificate was as follows:—"We have considered this case; and, as the case supposes the existence of the modus in question from time immemorial, we are of opinion that there does not appear any reason why this should be considered as a void modus in point of law.

2. *HEATON v. COOKE*. E. T. 1807. Ex. 1 *Wight.* 231.

And where it appears too rank, a Court of Equity will overrule it.

In this case Chief Baron Macdonald, Baron Graham, and Baron Thomson, \* A modus may be discharged either by the removal, alteration, or destruction of the thing for which the modus was paid, or by not making payment of the consideration of the discharge or by paying the tithes themselves. Thus, where the owner of a mill, of his own accord, without any cause or necessity, removes his mill to a new place; in this case the modus is lost; 1 *Roll. Abr.* 672. If there is a modus to pay a hack or doe, or a shoulder of a deer, for all manner of tithes in a park, or 10s. for the deer and herbage of a park, and not for all the park, in all cases where the park is disparked, the prescription is gone; and if the land is cultivated with corn, tithes in kind must be paid. In most cases indeed, where the origin of a park is discoverable, the modus is defective, as the king's licence to impark is seldom so ancient as the reign of Richard the First. So a prescription for a modus for hay or grass, on so many acres of land, is suspended if the land is converted into a hop garden or into tillage. But if the hop garden or tillage is not continued, and the land is relaid down for hay or grass, the modus revives; or if the modus is for land an alteration in the mode of using the land does not affect the modus; 2 *Inst.* 663. Again, the non-payment of the consideration; or payment of the tithes in kind, for so long a period that the modus cannot be proved will naturally destroy it, for custom and prescription may be lost, as well as obtained, by time. But a modern temporary interruption of ten or twenty years, is not understood in this way, and will in degree affect it; neither will the unity of possession, that is, to have the fee simple in the rectory; and likewise in the land, destroy a *modus decimandi*: 1 *Roll. Abr.* 936.

† And Lord Eldon has said, \* I have no difficulty in saying, and if it be important at this period to say it, I desire it may be understood, that after now about forty years' experience in the profession, I take it to be quite clear, that a court of equity in cases of this sort, as well as with respect to all cases where matters of fact are in question, has a right itself to determine upon the fact without the intervention of a jury. If the evidence which is before a court of equity is satisfactory upon the fact, I never can admit that a court of equity is bound to send any such case to the jury;" *Baller v. Michel*, 2 *Price. R.* 466.

agreed in deciding that moduses of one shilling and sixpence, and two shillings, per acre for tithe hay were rank moduses, arguing that it was the province of the Court to determine originally upon matters of fact of this kind, and to give the party the benefit of that opinion, without sending him to a jury.

On the other hand, Baron Wood, differing in *toto* from the above decision, said, that rankness was merely a species of evidence to negative the probability of a modus, and, as such, ought to be submitted to a jury, in his opinion the proper and only constitutional tribunal for the trial of a prescriptive modus. It was also to be remarked, that in all appeals from the Court of Exchequer to the House of Lords, when the Court had refused to grant an issue upon moduses, that house had uniformly reversed the decree of the Court, and granted the issue.—*Heaton v. Cooke*, Weight. R. 281.

### VIII. RELATIVE TO THE COMPOSITION IN LIEU OF.

#### (A) GENERAL REQUISITES OF.†

*CHATFIELD v. FRYER*. 1 Price, Rep. 253.

*Per Cur.* To make valid a composition real, it must be shown to exist by deed.

#### (B) DETERMINATION OF.

1. *ANON.* E. T. 1691. K. B. Lofft. 66.

*Per Cur.* A preremptory composition requires notice to determine.

2. *WYBURD v. TUCK.* E. T. 1801. C. P. 1 B. & P. 458.

The ancestors of the late Stephen Jermyn, having been lessees, under the dean and chapter of St. Paul's, of the tithes of the parish of Tottenham, about sixty years ago leased them to one Howard, who held them for thirty years, on the 28th of October, 1747. Stephen Jermyn was found lunatic, after which one Lambly became lessee under him, and on the 30th of April, 1781, obtained a new lease for seven years from Edward Tyson, the then committee of Stephen Jermyn; after the expiration of which he held over until the year 1798. In March, 1796, Stephen Jermyn died, upon which Harriet Eyre and Margaret Udney, the next of kin, took out administration. In May, 1796 the dean and chapter of St. Paul's granted a new lease of the tithes

A composition real must be proved to exist by deed.† To determine a composition, a notice seems requisite;

[ 80 ] Which ought, it appears, to be six months. If a rector, having made a composition, lease tithes

\* The validity of a modus of 3d. for every lamb payable on St. Mark's day, or as soon after as demanded, was sent to be considered by a jury, and the decree affirmed by the House of Lord; *Webb v. Giffard*, 4 Bro. P. C. 212; Gwm. 708.

† Real composition is where an agreement is made between the owner of lands and the parson or vicar, with the consent of the patron and ordinary, that his lands shall in futuro be freed from the payment of all tithes, in consideration of some land or other real recompence given to the parson or vicar in lieu and satisfaction of such tithes. No real composition for tithes can be good unless it was made before the 13th of the reign of Queen Elizabeth; for by a statute made in that year it is enacted, that no parson or vicar shall make any conveyance of any lands, tithes, tenements, or other hereditaments, being parcel of the possession of their churches, to any persons, except leases for twenty-one years or three lives; and though there have been several decrees made by courts of equity to confirm compositions made with the consent of the parson, patron, and ordinary, subsequent to the stat. 13 Eliz., still they are not held to be binding on the succeeding incumbents. "If," says Mr. Baron Graham, "You were allowed to support a defence of composition real by parol evidence of usage, so as to change it into a modus, it is perfectly clear that no man in his senses would ever plead a modus, because by pleading at once a composition real, a defendant would have the advantage of non-usage, and thus get rid of the objection as to rankness on all occasions. Not only so, but we should make every modus a composition real, and thus altogether expunge the doctrine of moduses; *Ward v. Shepherd*, 3 Price's Rep. 623; *Robinson v. Appleton*, Gwm. 1101; *Heathcote v. Mainwaring*, 3 Br. C. Rep. 217; see vide *Leach v. Bailey*, 6 Prince's Rep. 508.

‡ For the bare fact of a person having been in possession of less than what is due to him, or of that which is due in a less beneficial manner, is not of itself a ground for presuming a real composition, *Knight v. Halsey*, in Error, 2 Bos. and Pull. 206; and a deed creating a composition real will not be presumed from payment for two hundred years of a sum of 20l. in lieu of tithes; *Estcourt v. Kingscote*, 4 Muhl. Rep. 143. Also, since the stat. of 13 Eliz. for preventing the alienation of ecclesiastical estates, no composition of this kind can be made; and such, therefore, as appear to be of a later date, are invalid; the length of enjoyment, which in other cases is the best possible title, serves here only to weaken the claim of exemption from tithes as the difficulty of tracing its origin is increased; *Lord Petre v. Blencoe*, 3 Aust. P. 945; *Rose v. Colland*, 5 Ves. 186; see 2 Cox, Rep. 179.

and lessee make no alteration in the composition, when the tithes revert to the rector, &c. the occupier will continue to hold under the composition originally made and will be entitled to notice,\* before the rector can take tithes in kind.

So, the composition is determined by death, and where the composition is continued, the late incumbent's right is the value of the tithe he would have received had there been no composition.

[ 81. ]

to Harriet Eyre and Margaret Udney for twenty-one years, on their surrender of the old one. From them Lambly received notice, dated the 30th of September, 1797, to quit at Ladyday, 1798, with which he complied, and an assignment of their lease was executed to one Sperling on December 7th, 1797. Sperling executed a lease of the tithes to the present plaintiff, dated June, 15, 1798, to hold the same for seven years, from the 25th of March preceding.

During all the time that Howard and Lambly were tenants to the Jermyn family, the same composition was paid to them by the occupiers of lands in the parish, and Lambly was expressly forbid by those under whom he held to make any alteration therein. Sperling, having determined to raise the composition, gave a general notice to the parish, in March, 1793, that he was willing to treat with the landholders. In consequence of this, a meeting was held by them, at which the terms proposed by Sperling were not acceded to.

Per Eyre, J. If a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with a relation to the manure and cultivation of the land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself accordingly as he is to pay a composition or to pay in kind. We think it ought to be six months; and if so such notice be given, the parties will continue to hold under the original composition, though made and entered into by their predecessor.

3. WILLIAMS v. POWELL. M. T. 1805. K. B. 10 East, 269.

The late vicar of A. made certain compositions with his parishioners for the vicarial tithes, Williams v. Powell, 10 East, 269, which were payable on the 29th of September; and the Easter offerings were payable on the 10th of April in each year; and, having received his composition up to the 29th of September, 1802, he died on the 10th of March, 1803. In the May following, the defendant, the present vicar, was presented, and in November following was inducted. The Easter offerings were collected by the sequestrator after April, 1803, and were paid over by him to the defendant, and after Michaelmas, in the same year, the defendant received the vicarial tithes from some of the parishioners, according to the compositions, some more, some less, than the former: in all to the amount of 181*l.* and upwards. The plaintiffs, who were the personal representatives of the late vicar, brought this action for money had and received against the present vicar, to recover a proportion of such compositions up to the time of the late vicar's death, amounting, as they calculated them, to 68*l.* and upwards. The defendant disputed his liability to account for the compositions, which were not due till his own time, but paid 20*l.* into court, in order to cover any small sums which might have been due for tithes or dues, which if received in kind, might have accrued between the 29th of September, 1802, and the death of his predecessor on the 10th of March, 1803, which sum, it clearly appeared, was more than sufficient to cover any such tithes or dues. It was contended that the present vicar, having adopted the compositions made by his predecessor, and received them as such, and the consideration of such payment being for tithes, part of which, at least, had accrued in the time of such predecessor, had thereby charged himself with receiving a proportionable part of the gross sum up to the time of his predecessor's death for his use, and had admitted his liability *pro rata* to the plaintiffs, by payment of money into court. This case was compared to the case of Paget v. Goe, Amb. 198; 1 Burn's Just. tit. Distress, s. 18; where tenant in tail having leased, but not according to the statute, and dying without issue between the days of payment, and the remainder-man having received the whole rent, Lord Hardwicke held the latter liable to account for a proportion up to the death of the tenant in tail. But,

\* Where the lessee of tithes for one year underlets to the occupier, the lessee for the following year is liable to the owner, though no notice has been given to the occupier to determine the composition: Cox v. Brain, 3 Taunt. 95. A notice to determine a composition of tithes must be unequivocal. A demand of tithes vicarial, and a refusal to receive the composition tendered thereupon, are not sufficient; Fell v. Wilson, 12 East, 83.



Per Lord Ellenborough, C. J., in the case cited, each day's occupation by the tenant was valuable to him, and therefore there might be an equitable apportionment of the rent accruing from day to day, in respect of such valuable occupation; and the remainder-man who received the whole might well be considered as equitably accountable for the proportion of which accrued in time of the tenant in tail. But here the composition was at an end by the death of the former vicar, and the present vicar in fact received nothing for him, for no tithes had become due since the last payment in September beyond what money paid into court was sufficient to cover.

### IX. RELATIVE TO LEASES OF.\*

DEAN AND CHAPTER OF WINDSOR V. GOWER. 2 Saund. 304. a.

Action of covenant by a rector of a parish against the assignee of his lease for years of his tithes, who had covenanted for himself, his executors, and assigns, not to let any of the farmers of the parish have any part of the tithes without the plaintiff's, the lessor's, consent; and the breach was, that the defendant, the assignee, after the premises came to him by assignment, let some farmers in the parish have part of the tithes without the plaintiff's consent. After verdict for the plaintiff, it was objected in arrest of judgment that the action did not lie against the assignee, for it was a mere personal and collateral covenant binding the lessee only; and the tithes were incorporeal, lying in grant, and therefore such a covenant could not run along with them as it would with lands which lay in livery; and that a rent could not be reserved out them; for, if a lease were made of them by deed for years, it was good by way of contract to have an action of debt against the lessee, but the lessor could not distrain; and that the assignee of the tithes was not chargeable with the rent, and consequently the defendant could not be chargeable with breach of covenant in that case. But it was answered and resolved by the Court that the action was maintainable against the assignee; for, as to the objection that tithes were incorporeal, and therefore the assignee was not bound, they answered, that tithes were the tenth part of the profits of the land; the profits of the land were the land itself; tithes were tangible and visible; might be put in view in an assize; an ejectment lay for them; a *præcipe quod reddat* lay of

A covenant in a lease for years of tithes runs with the tithes, and binds the assignee. [ 82 ]

\* By 32 Hen. 8. all corporations sole seized in fee simple (who before the statute were unable to make leases for a longer period than their own time, without the concurrence of the necessary parties) may bind their successors by making leases for three lives, or twenty-one years, without any confirmation, provided the following requisites specified by the statute are observed: 1 Inst. 44. b.; Rex v. Chaloner, 1 Lev. R. 113; Acton and Pitcher's case, 1 Leon. R. 113; B. v. Holt, 1 Sid. R. 158; Watkinson v. Man, Cro. Eliz. 349; Ensden and Denny's case, Palm. 106. First, the lease must be made by deed indented, and not by parol or deed poll. Secondly, it must be made to begin from the day of the making thereof. Thirdly, if there be any old lease in being, it must be surrendered, or expired, or ended, within a year of the making of the lease, and the surrender must be absolute, and not conditional. Fourthly, there must not be a double lease in being at one time, the one for years, and the other for lives; but it must be either for twenty-one years, or three lives. Fifthly, it must not exceed three lives, or one-and twenty years from the day of the making of it, but it may be for a lesser term or fewer lives. Sixthly, it must be of lands or tenements which have most commonly let to farm, or occupied by the farmers thereof, for the most part of twenty years next before the making of the new lease, either for life or at years, or at will, is sufficient. Seventhly, the most usual and customary rent must be reserved yearly on such lease as has been paid for the lands within twenty years next before such lease made. By the statute 5 Geo. 3. c. 17 entitled, "An act to confirm all leases already made by the archbishops and bishops, and other ecclesiastical persons, of tithes and other incorporeal hereditaments, for one, two, or three life or lives, or twenty-one years; and to enable them to grant such leases, and to bring actions of debt for the recovery of rents reserved and in arrear on leases for life or lives," any other person or persons having any spiritual or ecclesiastical promotions are enabled to grant such leases of tithes, tolls, or other incorporeal inheritances, "which shall be as good and effectual in law against such archbishop, bishop, masters and fellows, or other heads and members of colleges or halls, deans and chapters, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors, and every of them, to all intents and purposes, as any lease or leases already made, or to be made, by any such archbishop," &c.; by virtue of the stat. 32 Hen. 8. c. 24. or any other statute then in being; and an action of debt may be brought by such lessors for rent in arrear, as in case of any other landlord or lessor.

a portion of tithes, and they were realized by stat. 32 Hen. 8, c. 7, s. 7; a warranty might be annexed to incorporeal inheritance, and that they had every property of an inheritance in land, except that they lie in grant, and not in livery; *Bally v. Wells*, 3 Wils. R. 25; *Dyer*, 85. a.

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## X. RELATIVE TO TITHES IN LONDON.\*

## XI. RELATIVE TO THE REMEDIES CONNECTED WITH.

(A) AT LAW.†

(a) *By action.*1st. *For treble value.*‡1. *What may be litigated in an action for.*

PHILLIPS v. DAVIES. H. T. 1807. K. B. 8 East, 178.

In an action for the treble value, the validity of a custom respecting the tithes may be decided. In an action on the stat. 2 & 3 Ed. 6. c. 13. for the treble value of tithes omitted to be set out. The Court said, it is not enough for the defendant to show the existence in fact of a custom in the parish to set out the 11th instead of the 10th, for the validity as well as existence of such a custom is properly triable in this form of action, though penal in its nature, being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him.

\* The situation of the London clergy is different from that of the clergy in other parts of the kingdom. In the reign of Henry VIII. continual alterations took place between the citizens and the clergy, relative to tithes and ecclesiastical dues: to put an end to these disputes the 37 Hen. 8. c. 12. established a commission at the head of which was the archbishop, with full power to give to their decrees the force of law if they were enrolled in the Court of Chancery before the 1st of March, 1543. By a decree of this commission, the tithes of houses and buildings is directed to be paid quarterly after the rate of 2s. 9d. for every 20s. yearly offerings. Great disputes, however, have arisen between the citizens and tithe holders, respecting the validity of this decree; for it appears, on the authority of Toulmin and Raithby, that it never was enrolled according to the obligation of the act, which consequently negated the claim of the clergy to 2s. 9d. in the pound on the rental. By the 22 & 23 Car. 2. c. 15. the tithes of all the parishes injured by the great fire in 1666 are valued at certain yearly sums, to be levied by an equal rate quarterly, and, on non-payment, the Lord Mayor is to grant a warrant of distress for the same, or, on his refusal, the Lord Chancellor, or two Barons of the Exchequer may grant such warrant but the wardens and minor canons of St. Paul's and the parson and proprietors of St. Gregory are to enjoy their tithes as formerly. By the 44 Geo. 3. c. 89. the annual composition for tithes in the parishes damaged by the fire is augmented and settled at certain fixed sums, from 200l. to between 300l. and 400l. per annum. By this act power to make assessments on houses and other buildings before the 21st of August, 1804, is granted to the alderman, common council and churchwarden in each ward, with right of appeal to the Lord Mayor and court of aldermen. Assessments may be altered every seven years. From this statement the established clergy of London appear divided into two classes. First, the clergy of the fifty one parishes damaged by the great fire have a fixed annual stipend, leviable by an equal pound rate on the parishoners, and the amount of which stipend, and the mode of assessment of which, are now regulated by the 44 Geo. 3. c. 89. Secondly, the rest of the clergy claim 2s. 9d. in the pound on the rental under the authority of a decree made pursuant to the 37 Hen. 8. c. 12; or, if this decree be disallowed, they claim their ancient tithe, or what other revenue they were entitled to prior to the passing of the act of Henry 8. In *Macdonald v. Young* proof was adduced of search and no enrolment found of this famous decree; in consequence the jury negatived the claim of the clergy to 2s. 9d. in the pound on the rental, as founded on the enrolment of the decree, conformable to the condition of the 37 Hen. 8. c. 12. The Court, however, admitted evidence of payment in other parishes as secondary evidence of its having been enrolled; *C. P. May 13, 1826. 1 R. & M. 89?*

† Before the stat. 32 Hen. 8. c. 7. an action for tithes could not have been maintained in the temporal courts; but by the 7th section of that statute it is enacted, "that any persons having an estate of inheritance, freehold term, or interest in tithes, and being disseised, or otherwise kept or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same as the case may require, in the like manner as they have for lands, tenements and other hereditaments." By force of this statute tithes have at this day all the incidents belonging to temporal inheritances. Hence an ejectment may be maintained for tithes; *Priest v. Wood. Cro. Car. 301.*

‡ By the 1st section of this statute it is enacted, "that every of the king's subjects shall truly and justly, without fraud or guile, divide, set out, and pay all manner of their pre-

2. *Of the parties to, and form of.\**

[ 84 ]

WYBURD v. TUCK. T. T. 1799. C. P. 1 B. &amp; P. 458.

A. executed a lease of tithes to B., on a day subsequent to their severance; but, before the tithes were carried away by the occupiers of the land, it was adjudged that B. could not maintain an action on the statute 2 & 3 Ed. 6. c. 13. as the right to the tithe vested in A. immediately on severance.

The party entitled to the tithe when severed must sue.†

3. *Of the declaration.*

FELLOWS v. KINGSTON. 2 Lev. 1.

The plaintiff declared that he was rector of D. and S., and that defendant, being occupier of lands in D. and S., carried off the corn untithed, without showing which part of the lands lay in D. and which in S. After the verdict for the plaintiff, on motion in arrest of judgment, the declaration was holden to be sufficient, for this action is in the nature of a trespass founded on a tort.

The declaration need not minutely describe the locus in quo.†

4. *Of the defence.‡*

[ 85 ]

dial tithes, in their proper kind, as they arise in such manner and form as hath been of right yielded and paid within forty years next before the making this act, or of right or custom ought to have been paid. And no person shall carry away such or like tithes which have been yielded or paid within the said forty years, or of right ought to have been paid in the places tithable, before he has justly divided or set forth for the tithe thereof the tenth part of the same, or otherwise agreed for the tithes with the person, vicar, or other owner or farmer of the same tithes, under the pain of forfeiture of treble value of the tithes so carried away."

\* The usual mode of proceeding on that statute is by action of debt, which may be brought in any of the king's courts, for predial tithes, such as are capable of being set out, both great and small, at the suit of the party grieved; per Macdonald, C. B. in *Scarr v. Trin. Coll.* 3 Anstr. R. 760; 9 Vin. Abr. tit. Dis. G. 6; *Beadle v. Sherman*, Cro. Eliz. 608; 2 Inst. 650.

† The action for not setting forth tithes may be brought by the rector; *Phillips v. Kettle*, Hard. 173; his lessee or lessees, *Camperton v. Hill*, Cro. Jac. 68; *Dagge v. Pinkevon*, Cro. Jac. 70; by an improPRIATOR or his lessee, though a layman, 8 Com. Dig. tit. Dis. M. 11; by a person farming the tithes of the rectory and the vicarage, *Day v. Peckwall*, Moor, 815; by tenants in common, who should join as plaintiffs, *Cole v. Runbury*, 1 Sid. 48; *Greenwood's case*, Clayt. 28; by executors, though not against them *Mr. J. Moreton's case*, 1 Vent. 3; *Holl. Bradford*, 1 Sid. 88; *Weeks v. Trassel*, 1 Sid. 181; *Moreton v. Hopkins*, 2 Keh. 602; *sed vid. contra* Anon. 1 Vern. R. 60.

‡ And it is not necessary for the plaintiff to set forth his title specially, because it is but inducement to the action: it is sufficient for him, to allege generally that he is rector, proprietor, or farmer, without showing by what title, *Babington v. Matthews*, Bulstr. 228, 1 Brownl. 86. 87; *Moyle v. Ewer*, Cro. Jac. 362; *Camperton v. Hill*, Yelv. 63. S. P.; for this is a personal action grounded merely upon a contempt against the statute in not setting forth the tithes and not for the recovery of the tithes, although the title to the tithes may come in question. In an action by two farmers upon this statute, who claimed under a lease as patentees for life of the king, an exception was taken, because they did not show the patent; *Dagge v. Pinkevon*, Cro. Jac. 70. But the objection was overruled; 1st. because the letters patent did not belong to the plaintiffs; 2ndly, because the plaintiffs did not demand the tithes themselves, but damages for a tort, and the title shown in the declaration is only conveyance to the action. Neither is it necessary to specify the kinds of grain, *Bedell and Wife v. Sherman*, 2 Inst. 650; 13 Rep. 47. S. C.; or by whom sown, or the number of loads of corn, 1 Brownl. 71; or hay carried away. And it is sufficient for the plaintiff to state in his declaration the single value of the tithes, *Coke v. Smith*, H. 7. Car. 1 B. R., without adding the treble value; and where the treble value is set forth, a mistake in computing it will not vitiate. Regularly, the declaration pursuing the words of the statute ought to allege that the defendant is *subditus domini regis*. But to allege the defendant to be *occupator terre* has been holden to be equivalent to that he is *subditus*; *Phillips v. Kettle* Hardw. 173.

§ *Nil debet* is the general issue usually pleaded to this action, *Bawtre v. Innes* Hob. 218, but it has been holden that not guilty. *Johnson v. Carne*, Cro. Eliz. 621. 2 Inst. 651; 2 Inst. 651. S. P.; *Wortley v. Herpingham*, Cro. Eliz. 766; *Camperton v. Hill*, Moor, 914. is also a good plea. The statute of limitations, 21 Jac. 1. c. 16. cannot be pleaded to this action, *Talory v. Jackson*, Cro. Car. 513; recognised in *Cochran v. Welby*, 1 Mod. 246; for that statute, s. 3. is confined to actions of debt, grounded upon a lending or contract without specialty, and to debt for arrears of rent. But by stat. 53 Geo. 3. c. 127. s. 5. no action shall be brought for the recovery of any penalty for the not settling out tithes; nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought or such suit commenced within six years from the time when such tithes became due.

**1. BLUNDEL v. MAUDSLEY.** E. T. 1812. K. B. 15 East, 641.  
 A *modus* is a defence to this action. In debt, upon the stat. 2 & 3 Ed. 6. c. 13. for not setting out a tenth as the tithe of hay. The Court said, the plaintiff is entitled to recover upon his common law right, unless there be evidence of some certain good *modus* or customary payment in lieu of the common law tithe.

**2. MITCHELL v. WALKER.** E. T. 1793. K. B. 5, T. R. 260.  
 But proof of non-payment of tithes within living memory is no defence where declaration was that they were payable within forty years before the statute.\*  
 [ 86 ] In debt on this statute by the rector, it was stated in the declaration, that the plaintiff was rector of the parish, and the defendant occupier of the lands within the same; that the tithes were within forty years next before the statute of right yielding and payable, and yielded and paid; that the defendant, in November, 1791, ploughed and sowed the land with, which he afterwards carried away without setting out the tithe. On *nil debet* pleaded, it appeared at the trial, that the land in question, as far back as any witness knew, had been in grass, and had been ploughed for the first time in 1791, and no evidence was given of its ever having paid tithe. It was contended for the defendant, that the jury were bound to find for the defendant, unless they found that tithes had actually been paid in respect of this land within forty years before the statute, of which there was not any evidence; on the contrary, the evidence given rather went to rebut such a presumption, and was sufficient to warrant the jury in presuming a grant in favour of the defendant. Verdict for plaintiff. On motion to enter a nonsuit,

Lord Kenyon, C. J., said, that usage had constantly been against the necessity of the proof contended for by the defendant; that he remembered many actions having been tried, where the lands in respect of which the tithes were claimed, where the same objection, had it been available, must have prevailed, but the plaintiff recovered in all; that the non-payment of tithe of itself signified nothing; and that there was not any ground for saying that tithes ought not to have been paid here. Buller, J., observed that, with respect to the presumption of a grant in favour of the defendant, he could not leave that question to the jury without some evidence to support it, and here was none; if indeed it had appeared that this land had been ploughed before, and yet no tithes had been exacted for it, that might have afforded some ground for such a presumption. (See the same opinion expressed by Wilmot, C. J., in *Mansfield v. Clarke*, 5 T. R. 265. n.) But he thought the onus of proving the exemption lay with the defendant.—Rule discharged.

**3. BOLLO v. ATKINSON.** T. T. 1675. K. B. 1 Lev. 185.  
 A discharge by real composition, it is said, must be pleaded. A farmer of tithes proved. In this case the Court said: It cannot be intended a discharge by a real composition, it not being pleaded nor found by the jury to be so.

#### 5. Of the evidence.†

**1. SELWIN v. BALDY.** Sum. Ass. 1682. Bull. N. P. 188.  
 The plaintiff declared as farmer of the rectory of Freston, in Sussex; and proved himself lessee of J. S., who was lessee to the dean and chapter of

\* Plea, that the plaintiff sowed the corn and sold it to the defendant, is not a good plea; because such sale will not excuse the payment of tithes; *Moyle v. Ewer*, 2 Bulstr. 183; *Cro. Jac.* 361. S. C.

† In an action of debt under the stat. 2 & 3 Ed. 6. c. 13. for not setting out tithes, the plaintiff must establish: 1st, his title as rector, lay impropriator, &c.; 2nd, the defendant's liability as an occupier of lands within the parish; and 3rd, the value of the tithes. Long possession acquiesced in by the defendant, *Clayt.* 48. Pl. 83; *Chapman v. Beard*, T. 27. G. 3. Scacc; 4 Gwm. 1482; *Harris v. Adge*, Scacc. T. 9. W. 3. 2 Gwm. 560. is *prima facie* evidence of the rector's title against defendant, and supersedes the necessity of proving institution, induction, or tending the Thirty-nine Articles.

In penal actions, on stat. 2 and 3 Ed. 6. it has always been holden sufficient proof against the defendant, that the party suing is in the act of receiving the tithes from defendant, *Lord Kenyon, J. C. in Radford, q. t. v. McIntosh*, 3 T. R. 632: where it was holden that, in an action for penalties on the statute laying a tax on post horses, brought by the farmer of the tax, it is not necessary for the plaintiff to give in evidence his appointment by the Lords Commissioners of the Treasury, or the Commissioners of the Stamp Duties, authorised by them; proof that the defendant has accounted with him as farmer for the duties is sufficient. A lay impropriator is entitled both with respect to time and exemptions, and consequently if he prove himself impropriator, it will be sufficient without proving the receipt of tithes within tee time of memory; *Wheeldon v. Har-*

Chichester, to whom the rectory belonged, and produced the lease from J. S., but did not produce the lease from the dean and chapter to J. S.; however, upon proving that he received tithes of others as farmer, it was held sufficient. [ 87 ]  
ducing the  
lease of the  
dean's les  
see suffic  
ent.\*

2. *HALLWELL v. TRAPPESE*. E. T. 1806. C. P. 2 N. R. 173.

The declaration stated, that "the tithes of turnips were yielded and paid, and were of right due and payable within forty years next before the making the stat. Edw. 6." The second contained a similar averment as to the tithes of potatoes. After verdict for the plaintiff, it was moved to set it aside, on the ground that the averments were not, and could not, be proved, inasmuch as turnips and potatoes were not cultivated before the stat. of Edw. 6. But the Court said that the true construction of the stat. Edw. 6. was, that, if the lands charged were subject to the payment of tithe within the period mentioned in the statute, that was sufficient to prove the allegation in declarations of this kind, and to support the plaintiff's action; that, if it were clear that nothing but wheat had ever been sown upon this land, still they would not preclude the tithe or other titheable produce from being taken; and that, as no evidence had been offered at the trial to prove that turnips and potatoes were not cultivated previously to the stat. Edw. 6. they could make no such presumption against the justice of the case, even though such a fact might be asserted by persons who had written upon the subject; they added that, whatever might be the case with respect to potatoes, their own information led them to believe that turnips were in cultivation in this country before the stat. of Edw. 6. Where a  
declaration  
stated that  
the tithes  
of turnips  
were due  
and paya  
ble within  
forty years  
next before  
the stat. of  
Edw. 6. it  
was holden  
sufficient,  
though  
there was  
no evi  
dence to  
show that  
turnips exis  
ted before  
that statute.  
[ 88 ]

#### 6. Of the verdict.

*BASTARD v. HANCOCK*. M. T. 1694. K. B. Carth. 361; S. C. Cited *BARNARD v. GOSTLING*, 2 East, 573.

In an action on this statute against several defendants, upon *nil debet*, the jury found for the plaintiff against one defendant only; and, as to the others, *nil debet* upon motion in arrest of judgment, because it was an action of debt founded on a tort, and not on a contract; not guilty would have been a good *verdict* may be for one defendant and against his co-defendant. The ver  
dict may  
be for one  
defendant  
and against  
his co-de  
fendant.

*vey*, Hen. 9; Geo. 2 Scacc; 3 Gwm. 951. The plaintiff must prove a valid title, or per-ception of tithes, or a composition formerly made. A treaty for a composition which went off will not do; *Wyburd v. Tuck*, 1 B. and P. 458. An answer to a bill filed in the Court of Exchequer, in a suit instituted for tithe hay, by a vicar against the rector and others (owners of lands in the parish) in which answer the defendants disputed the vicar's claim, and declared that the tithes in question belonged to the rector, will be evidence in an action for tithes by a succeeding rector against owners or occupiers of the same lands for the tithes of which the former suit was instituted; *Lady Dartmouth v. Roberts*, 16 East, 331.

\* So, when the plaintiff, *Hartridge v. Gibbs*, Bull. N. P. 188. being farmer under the Dean and Chapter of Canterbury, proved that he had received tithes for some years as such, it was holden sufficient without producing any lease. The defendant upon the general issue may prove, 1 Browne, 84. that he duly set forth his tithes, but he afterwards carried them away; such defence will not avail him. So, if he sell his corn privately to another, and, after selling it in that manner, cuts and carries it away, the action lies against the first owner. The same law is, 2 Inst. 649. where the owner of the land privately sells his corn to another, who privately cuts and carries it away. Defendant under the general issue of *nil debet*, *Charry v. Garland*, Dorset. Lent. Ass. 1699. coram Ward, C. B. 3 Gwm. 951. may give in evidence a modus or customary payment, and thereby defeat the plaintiff's action. A modus must be immemorial; that is, it must have existed before the time of Richard the First's return from the Holy Land, but as this cannot be proved by living witnesses, and in many cases not by written evidence, it is sufficient to prove that such a sum has been paid as far back as living memory extends; and that being established, it will lie on the other side to prove the negative. In a suit for tithes where the point in issue is whether there exists a modus of a certain sum of money for a particular farm in a township within the parish, though the defendant will not in general be allowed to inquire whether other farms in the same township are not subject to the same payment, yet such inquiry may be made by the other side in cross examination to show that such payments cannot be a modus consistently with the evidence which has been previously adduced; *Blundell v. Howard*, 1 M. & S. 292.

† If the verdict be given for the plaintiff, *Degge*, 6th Ed. 404. it is incumbent on the jury to find how much of the debt demanded by the declaration is due to the plaintiff; which is to be done by trebling the value of the tithe subtracted.

plea, and therefore a verdict may be given against one of the defendants, and for the others as in actions upon torts.

7. *Of the costs.\**

BARNARD V. MOSS. H. T. 1789. C. P. 1 H. Bl. 107.

The plaintiff is not entitled to costs unless the single value has been found by the jury not to exceed twenty nobles.

This was an action of debt on the stat. 2 & 3 Edw. 6. c. 13, to recover treble the value of tithes not set out. There was also a count for the single value. The defendant demurred to the declaration, but the parties afterwards agreed to submit to arbitration, and judgment was entered to stand as a security for costs; the arbitrator determined the single value of the tithes to be less than twenty nobles, and awarded treble the sum of the plaintiff, viz. 19l. 2s. 6d., together with the costs of the reference, and that he might sue out execution. The plaintiff is not entitled to costs on the counts for the penalty under the stat. 8 & 9 W. 3. c. 11. s. 5. the value not having been found by a jury, but they allowed him to have the costs taxed on the single value.

[ 89 ]

8. *Of the new trial.*

SELSEA V. POWELL. T. T. 1815. C. P. 6 Taunt. 297.

A new trial may be granted.

In an action for not setting out tithes, the statute 2 & 3 Edw. 6. c. 13. is a remedial act; and in an action thereon the Court will grant a new trial for a mistake of the jury.

9. *Of the judgment.†* 2d. *For not removing.*

1. WILLIAMS V. LANDER. H. T. 1798. K. B. 8 T. R. 72.

Case and not trespass lies for not removing tithes.‡

Per Kenyon, C. J., Though the proprietor of tithes leave them on the land more than a reasonable time after they are set out, and after he has notice thereof, the owner of the land cannot justify in trespass turning in his cattle upon the land to depasture it in the usual course of husbandry, whereby the cattle consumed the tithes; but his remedy is either by distress or by action.

2. KEMP V. FILEWOOD. T. T. 1809. K. B. 11 East, 358.

The notice to remove (where a prior notice of the intention to set out) need not again specify the kind or from what land.

Due notices having been given to the parson of the setting out the tithes of fruit and vegetables in a garden, which were accordingly set out on the days specified; and the tithes not having been removed at the distance of a month afterwards, when they had become rotten, a notice was then given by the owner to remove the tithed fruits and vegetables within two days, otherwise an

\* S. 2. of the 2 & 3 Fdw. 6. empowers the rector, &c. or his servant, to see that the tithes is justly set forth, and to carry away the same, and gives a remedy in the Ecclesiastical Court for the recovery of the double value of tithes subtracted, with costs. As to the first part of this branch, it is merely declaratory of the common law, because, for stopping the way of the party to whom the tithes ought to be paid, an action on the case might have been maintained at common law. As to the second part, it is to be observed that the parsons, &c. were entitled in the Ecclesiastical Court to recover the tithes themselves, and therefore the double value in addition made the recovery in the Ecclesiastical Court equivalent to the treble forfeiture under the former clause; but costs being given by this action rendered the suit in the Ecclesiastical Court more advantageous; for at common law, the plaintiff was not entitled to costs, 2 Inst. 651; but now by statute 8 and 9 W. 3. c. 11. s. 3. "in actions of debt upon the statute for not setting forth tithes, wherein the single value or damage found by the jury shall not exceed the sum of twenty nobles, (6l. 13s. 4d.) the plaintiff obtaining judgment on any award of execution, after plea pleaded or demurrer joined shall recover his costs." In like manner, if the plaintiff was nonsuited, or the defendant obtained a verdict, the defendant was not entitled to costs, under the statute 23 Hen. 8. c. 15; for an action on this statute, 2 Edw. 6. was not an action upon a specialty or contract, nor for a personal wrong immediately done to the plaintiff, but for a nonfeasance, *Downton v. Finch*, 2 Inst. 651; but now by the same statute, 8 and 9 W. 3. c. 11. s. 3. "if the plaintiff shall become nonsuited, or suffer a discontinuance, or a verdict shall pass against him, the defendant shall recover his costs."

† If judgment be for the plaintiff by *nil dicit*, *non sum informatus*, or upon demurrer, 1 Hegge. 404; the judgment may be entered for the whole debt demanded by the declaration. So, if the issue be on a collateral matter, *Costerdam's case* cited in *Yelv.* 127; as on the custom of tithing, or discharge by statute, *Dowles v. Broadhead*, *Aleyn* 88; which if found against the defendant, and he has not taken the value by protestation, he shall pay the value expressed by the plaintiff in his declaration; for by the collateral matter pleaded in bar, the declaration is confessed in the whole.

‡ Where there is a composition in lieu of tithes, an action for debt or assumpsit is sustainable, and on a lease for tithes ejectment will also lie; *Dean and Chapter of Windsor v. Gover*, 2 Saund. R. 304; *Baldwin v. Wine*, *Cro Car.* 301; *Camell v. Clavering*, *Lord Raym.* R. 789.

action would be commenced against the parson. The Court said, it is sufficient notice of their having been set out whereon to found an action if they be not removed; and due notices having been given of setting out tithes of garden vegetables and field barley on certain days between the 11th and 16th of September, a general notice on the 17th to the parson to take away all the tithes of his (the plaintiff's) lands within two days is sufficient whereon to found the like action.

### 3d. Ejectment for holding over.

DOE, D. BRIERLEY, v. PALMER. T. T. 1812. K. B. 16 East, 53.

In ejectment against a lessee of tithes for holding over after the expiration of a notice to quit. The Court held, that some evidence must be given to show that he did not mean to quit possession; as by his declaration to that effect, or even his silence when questioned about it, or, as by showing that the defendant, who claimed by assignment from the original lessee, had entered into the rule to defend as landlord.

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In ejectment for holding over, an intention not to quit must be shown.\*

(b) *Of the prohibition.*†

(B) IN EQUITY.‡

[ 91 ]

\* In an ejectment against the lessee of tithes, after a determination of the lease by notice, proof must be given of possession after the expiration of the notice, this fact may be established by means of the rule to defend, as also by evidence that upon a demand made after the expiration of the notice the defendant refused or was silent; Doe v. Palmer. 16 East, 53; notice to quit at a later term. Ibid. (i. e.) if given with intent to waive the first notice, Doe v. Humphreys, 2 East, 237; provided evidence be given to show that a grant existed, it is not essential to produce it any more than in the case of a composition real; Heathcote v. Mainwaring, 3 Bro. C. C. 217.

† The courts of Westminster-hall, having a general superintendence over all other courts will grant a prohibition to stay proceedings of an inferior court, either *pro defectu jurisdictionis*, *pro defectu triationis*, or for proceeding as the law of the land does not warrant; and, if the judges or parties proceed notwithstanding the prohibition, an attachment may be issued, or an action upon the case brought against them; Bul. N. P. 218; Woods, Inst. 570. It is in the discretion of the Court to grant or deny the writ of prohibition, as may appear to them according to the truth of the surmise or otherwise; Parish of Ashton v. Castlebrimidge Chapel, Hob. R. 66; Serjeant Morton's case, 1 Sid; and this writ immediately prohibits the Court from holding plea, and the parties from proceeding on matters where the Court has no jurisdiction, as well after judgment and execution as before, 2 Inst. 602; Leman v. Greetly, 3. T. R. 3. In obtaining, prosecuting and defending prohibitions, the party aggrieved in the court below applies to the Superior Court, setting forth in a suggestion upon record, the nature and cause of his complaint; upon which, if the matter alleged appears to the Court to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold and the party not to prosecute, the plea; but sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the Court to declare in prohibition, that is, to prosecute an action by filing a declaration against the other, upon a supposition (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition; and, if, upon demurrer and argument, the Court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, the judgment with nominal damages shall be given for the party complaining, and the defendant and also the inferior Court shall be prohibited from proceeding any further.

On the other hand, if the superior Court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of consultation shall be awarded, so called, because, upon deliberation and consultation had, the judges find the prohibition to be ill founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court; and, even in ordinary cases, the writ of prohibition is not absolutely final and conclusive; for though the ground be a proper one in point of law for granting the prohibition, yet if the fact that gave rise to it be afterwards falsified, the cause shall be remanded to the prior jurisdiction; 3 Bl. Com. 113, 114; Croucher v. Collins, Saund. 186. a. b. vide Degge, c. 26. 387.

‡ For the recovery of tithes there is the equitable remedy by bill either in Chancery or the Exchequer; both of which Courts have long entertained suits for tithes; formerly, however, the jurisdiction of Chancery in this respect was questioned; it being so far from settled in Lord Coke's time, that there are instances of controverting it even since the restoration; 1 Freem. 303; 2 Ch. Ca. 237. But as to the Exchequer, tithes are said to have been anciently cognizable there, though this is contradicted by Lord Chancellor Nottingham, who dates the origin of the proceeding by English bill, and consequently that court's

(C) IN THE ECCLESIASTICAL COURT.\* See also *ante*, tit. Ecclesiastical Court.

(D) BEFORE JUSTICES OF THE PEACE.†

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(E) OF FEIGNED ISSUES. See *ante*, vol. ix. p. 563.

(F) OF THE EVIDENCE.

(a) *Of public documentary evidence.*

3d. *Taxation of Pope Nicholas.‡*

equitable jurisdiction over tithes, from the stat. of Hen. 8. erecting the court of Arguments; Hard. 236; 1 Freem. 308; and 33 Hen. 8. c. 39. This equitable interference of Chancery and the Exchequer with tithes is generally considered as merely incidental and collateral; namely, as a consequence of their jurisdiction in account and in enforcing discovery, 3 Blackst. Com. 9th Ed. 437; and the reasons of the appellant in Whitehead and others, Dom. Proc. Jan. 1779. But some give a broader foundation to this branch of Exchequer jurisdiction; and in respect of extra-parochial tithes, which are part of the ancient inheritance of the crown, they insist that suits for tithes must ever have fallen within the compass of the Exchequer's direct and substantive jurisdiction as a Court of Revenue. See the case of respondent in the appeal before cited, and Hard. 117 perhaps it is upon this idea, as well as on account of the greater frequency of suits for tithes in the Exchequer, that Lord Hardwicke, calls that Court the proper jurisdiction for them; 3 Atk. 247. As to the bill, parties, answer, evidence, costs, &c., being the same as in ordinary proceedings in that Court; see *ante*, tit. Chancery, Court of.

\* The ecclesiastical courts have no jurisdiction to try the right of tithes, unless between spiritual persons: in ordinary cases between spiritual men and laymen, they can only compel the payment of them when the right is not disputed. So, in disputes about tithes, if the defendant plead any custom, modus, or composition, or other matter in which the right of tithing is involved, this takes the question out of ecclesiastical jurisdiction; for the law does not allow the existence of such a right to be decided by the sentence of a spiritual judge, who may be interested therein without the verdict of a jury.

† By the stat. 7 & 8 W. 3. c. 6. (made perpetual by stat. 3 & 4 Anne, c. 18. s. 1.) a summary method of proceeding before two justices of the peace is prescribed for recovering small debts under the value of forty shillings. But this statute contains a proviso, s. 8. that if the party complained of shall insist before the justices of the peace, upon any prescription, composition, modus, agreement or title, and deliver the same in writing to the justices of the peace, subscribed by him or her and shall give security to the complainant to pay such costs as, upon a trial at law shall be given against him, in case the prescription &c. be not allowed; then the justices of the peace shall forbear to give judgment, and the complainant may prosecute the adverse party for the subtraction of tithes in any court as before this act. The 9th section directs the judgment given by virtue of this statute to be enrolled at the next general quarter sessions, and after enrolment and satisfaction made, the judgment shall be a bar to conclude the party entitled to the tithes from any other remedy. By the stat. 7 & 8 W. 3. c. 34. (made perpetual and extended to all customary payments belonging to any church or chapel by 1 Geo. 1. stat. 2. c. 6.) the like remedy is extended to all tithes due from Quakers; and two justices of the peace are empowered to ascertain what is due, and to order payment so as the sum ordered does not exceed 10*l*. These statutes were made in favour (see *Rex v. Wakefield*, 1 Burr. 487; *Burns's Justice*, tit. Tithes, S. C.) and for the ease and benefit of Quakers, to save them from troublesome and expensive prosecutions. But it was never meant that a mere scruple of theirs, or an obstinate withholding of the tithes, should be any hindrance to the matters being determined by a justice of the peace. This would have frustrated the very intention of the legislature which meant to give this jurisdiction to the justices in that very case, where the real right and title to the tithes should not be in dispute. The provisions of these acts have been adopted and extended by the 53 Geo. 3. c. 127. and 54 Geo. 3. c. 63; the first applying to England the latter to Ireland. By the 4th section of each act, the jurisdiction of the two justices is extended to tithes, oblations, and compositions of the value of 10*l*.; and by the 6th section in respect to tithes and church rates due from Quakers, to 50*l*.; in either case, one justice is made competent to receive the original complaint, and to summon the defaulter before two. The 7 & 8 W. 3. c. 6. does not allow the magistrate to act, when interested in the suit; to remedy which, the 7 Geo. 4. c. 15. provides that, where the justice is the patron of a living, the small tithes may be recovered before the justice of the adjoining place or county.

‡ The taxation of Pope Nicholas the Fourth, kept in the King's Remembrancer's Office, in the Exchequer, was finished in the 19th and 20th years of Edward I., to whom that Pope granted the tenths and first fruits of all ecclesiastical benefices for six years, in order that the king might be better enabled to fulfil the promise he had made to the Pope and proceed to the Holy Land. All taxes paid to our kings and to the popes were regulated by this document, until the survey made in the 26th year of Hen. VIII.; it is, therefore evidence, or a medium of proof, affording an inference of the rate or value at which the persons employed thought fit at that time to estimate a living; per Lord Redesdale in *Pullen v. Mitchell*, 2 Pr. Rep. 477.



4th. *Nonne Rolls*.\*6th. *Court of Augmentation*.†8th. *Licences from the Pope*.‡(b) *Of private documentary evidence.* See *ante*, tit. *Evidence*.(G) *OF THE WITNESSES*.§

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**Title Deeds.** See *ante*, tit. *Deeds*.

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**Title of Court.** See *ante*, tit. *Declaration*.**Title of Terms.** See *ante*, tit. *Declaration*.**Title of Plea.** See *ante*, tit. *Plea*.**Toll.** See *post*, tit. *Turnpike*.

## I. DIFFERENT KINDS OF.

\* The *Nonne Rolls*, kept in the King's Remembrancer's Office, are inquisitions returned to a commission for assessing the ninth part of the value of sheaves, fees, and lambs, throughout the kingdom. King Edward III. was empowered by act of parliament to appoint commissioners in every diocese and deanry, to enquire into the real value of all ecclesiastical benefices, rectories, vicarages, and other property, who certified their proceedings under seal. In these inquisitions, the prelates, earls, barons, commons, and parishioners of every parish, stated on their oath the true value, sometimes separately, of the sixth of their sheaves, wool, and lambs; then the ancient tax of Pope Nicholas, and the circumstances which had produced an increase or decrease of value since that period. The latter part of the inquisition relates to "all those who dwell in forests and wastes, and all others that live not of their gain nor store: who by the good advice of them who shall be deputed taxers, shall be lawfully set at the value to the fifteenth, without being unreasonably charged." Some of the original inquisitions, from whence the *Nonne Rolls* were formed, as well as the enrolments themselves, are now in the Exchequer; though they do not appear to have been transcribed into books. It should also be observed, that neither the book of Pope Nicholas' Valor, nor the *Nonne Rolls*, are so ample in many instances, as the returns from whence they were respectively formed. These inquisitions are constantly used as evidence in tithe causes, and show the alterations which had taken place in the value of benefices and property, after an interval of fifty years, from the prior valuation of Pope Nicholas' taxation, as well as what the commissioners estimated the value of the property at that period; Rep. Com. Pub. Rec. in 1801 and 1812; Appendix to Hume's Hist. of Eng. ch. 15. 14 Ed. 3. st. 2.

† In the 27th year of Henry VIII., a judicial court was established, under the title of the Court of Augmentation, for determining disputes that might arise respecting the lands and other possessions which had or might come into the hands of the crown, in consequence of the dissolution of monasteries—the seizure of the possessions of the knights templars—the surrender of hospitals—or the forfeitures and vacancies of bishoprics, abbeys, and priories; and it was so called, because the revenues of the crown were much augmented by the suppression of the said houses. This was a court of record with a seal: besides the Chancellor of the Court of Augmentation, there was a treasurer, attorney, solicitor, several auditors and receivers, with clerks and other necessary retainers to a court. The bailiff's reeve's, or minister's accounts, were accounts of these and other possessions belonging to the crown, rendered by them annually by the auditors of the crown; and as the Court of Augmentation was dissolved by act of parliament (not printed), in the first year of Mary, the possessions having been granted away, the records were declared to be the records of the Court of Exchequer, and the ministers or accountants of the crown soon ceased to make their annual returns on separate rolls, but gave in their accounts of the estates of the crown, however acquired, in rolls for each county; Bullen v. Mitchell, 2 Pr. R. 477; Boulton v. Richards and Booth, 6 Pr. R. 469; Kennicot v. Watson, 2 Pr. R. 250; Sir F. Canliſſ v. Taylor, 2 Pr. R. 323.

‡ As the pope was formerly the supreme head of the church, and had the disposition of all spiritual benefices, with the same power in spiritual matters that any other inferior ordinary enjoyed, licences from him, even unaccompanied by the king's licence, are admissible as evidence of an impropriation; Cope v. Bedford, Palm. R. 427; Ward v. Britton, Gwm. 330; for the same reason, a pope's bull has been admitted in evidence to show that a particular monastery had a special exemption from the payment of tithes: Lord Clanricarde's case, Palm. R. 37; and an exemplification under the bishop's seal is sufficient evidence of the pope's bull; cited in Hard. R. 118.

§ Where the issue is on any custom, all those who are interested in either establishing or defeating the custom, are incompetent to further such interest by their testimony, where the question was as to the payment of tithe wood, in the Woud of Kent, all those who, as owners or farmers, were entitled to any wood there were held to be incompetent; Earl of Clanricarde v. Lady Denton, Gwm. 360.

(A) TOLL TRAVERSE, p. 94.

(B) ——— THOROUGH, p. 95.

II. OF MARKET TOLLS, AND NAVIGABLE RIVERS, p. 96.

III. COMPUTATION OF AND EXEMPTION FROM, p. 97.

IV. GRANT OF, p. 98.

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VI. DISTRESS FOR, p. 100.

VII. OF THE WRIT DE ESSENDO QUIETUM DE THEO LONIO, p. 101.

## I. DIFFERENT KINDS OF.

(A) TOLL TRAVERSE.

Toll tra  
verse is on  
a man's  
own soil.\*

1. JAMES V. JOHNSON. H. T. 1675. C. P. 2 Mod. 143.

*Per Cur.* Toll traverse is on a man's own soil.

2. COLTON V. SMITH. E. T. 1774. K. B. Cowp. 48. S. P. PELHAM V. PICKERSGILL. 4 T. R. 660.

And the  
considera  
tion thereof  
is implied;

Counsel, in argument, agreed that the case in 2 Wils. 293, was a toll thorough where a consideration was necessary to be laid, and admitted that, in a toll traverse, as here, no consideration was necessary, because it is implied; but he insisted that, as the plaintiff had thought fit to lay a consideration, and make it part of his prescription, the consideration as laid ought to be sufficient in law; but this was not; for no consideration is binding upon a third person unless he receive the benefit of it, and here every body who pays has not the benefit of it. As to the case in 3 Lev. 424. it is not this toll; and that case is nowhere reported, or even cited, but in 2 Lev. 96. Lord Treby, C. J., in Lutwyche, makes a quære if such a consideration be good.

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And need  
not be stat  
ed in a dec  
laration  
thereon;  
but, if stat  
ed, must be  
proved.

3. PELHAM V. PICKERSGILL. E. T. 1787. K. B. 1 T. R. 660.

Ashurst, J. It is properly admitted that toll thorough cannot be supported without showing a consideration, but toll traverse may; and the reason is, that the very circumstance of passing over the soil of a private person where the public had no right before to pass imports a consideration: at the same time, if this were a new case, we should inquire into the reason of this distinction, because, in every case which requires a consideration, it ought, from length of usage, to be presumed; for the rule with regard to prescriptions is good, if, by any possibility, it can be supposed to have had a legal commencement. That is the general rule, and I cannot see why a good consideration for toll thorough cannot be presumed as well as for toll traverse, because the giving of the soil to the public is in itself a good consideration. But, in all probability, the distinction arose from the difficulty in most cases of showing that the toll and ownership of the soil were coeval; for there are very few cases where it could possibly be shown, and that distinguishes it from all the former determinations. It is unnecessary to state it in the declaration; but, if alleged, it must be proved.

(B) TOLL THOROUGH.

1. JAMES V. JOHNSTON. H. T. 1676. C. P. 2 Mod. 143.

Toll thor  
ough is on  
the king's  
highway,†  
and the con  
sideration  
thereof  
must ap  
pear.

*Per Cur.* There are two sorts of toll, viz. toll thorough and toll traverse, and one is on the king's highway and the other in a man's own soil, and it does not appear for which the defendant has justified: if it be for the first, then he ought to show that he did make a causeway, or some other thing, that might be an advantage to the passengers, to entitle himself to a prescription; but, if it be for the other, then he must also show it was for passing his soil, which implies a consideration; Assize, Kerlw. 148; Pl. Com. 236. Lord Berkley's case; 1 Cro. 710. Smith v. Sheppard; by which case it appears that the justification ought to be certain; Cotton v. Smith, Cowper, 47.

\* And toll-traverse may be claimed as appurtenant to a manor, by a que estate; James v. Johnson, 1 Mod. 281.

† Toll thorough cannot as such be claimed: but a consideration for it must be shown; Rex v. Corporation of Boston, W. Jo. 162; Warren v. Prideaux, 1 Mod 105; Willes, 111.

## 2. TRUMAN v. WALGHAM. E. T. 2766. C. P. 2 Wils. 296.

Trespass. Prescription for toll through the streets of Gainsborough, in Hence a consideration of repairing divers streets there. prescription for toll through the streets of a town, in consideration of repairing divers streets there, was held void, because it did not say he repaired all the streets there.\*

*Per Cur.* This is a prescription for a toll through the king's highway, the streets of Gainsborough, which cannot be taken without a good consideration be alleged; the reason is, because it is to deprive the subject of his common right and inheritance to pass through the king's highway, which right of passage was before all prescriptions; Moor, 574, 575. Toll traverse, or for going through a man's private land, may be prescribed for without any consideration, and payment time out of mind is sufficient, and will support the prescription. In the case at bar, toll is demanded of the subject in the king's highway for passing; there the subject ought to have a benefit for paying it. The consideration here is for requiring, cleansing, and maintaining divers and many streets in Gainsborough, not for repairing, &c. all the streets there; how therefore can we say that the plaintiff's waggon was passing through any street repaired by the lord of the manor? The waggon might be passing over some street not repaired by him when the distress was taken, for anything that appears to the contrary, and we must take it that it was so: we cannot let the defendant have judgment upon this record. Courts are exceedingly careful and jealous of these claims of right to levy money upon the subject: these tolls began and were established by the power of great men. The defendant's plea is as bad as can be: the lord has artfully tried to make it doubtful whether this be a toll thorough or toll traverse, for he has confounded them together: the consideration he claims for it is for mending the highway, and he would have us believe it is for passing through his own manor or land.

## 3. PELHAM v. PICKERSGILL. E. T. 1785. K. B. 3 Burr. 1402.

*Per Lord Mansfield, C. J.* Toll thorough may be served from the soil whence it arises.

Toll thorough may be severed from the soil whence it arises.

## II. OF MARKET TOLLS AND NAVIGABLE RIVERS.†

## 1. HILL v. SMITH. T. T. 1812. C. P. 4 Taunt. 520.

The Court held a prescription for toll in respect of goods sold by sample in a market, and afterwards brought in the city to be delivered, cannot be supported. A claim of toll thorough cannot be supported without showing a beneficial consideration moving to the person of whom it is claimed.

A prescription to market tolls on sales by sample can not be supported.

## 2. HILL v. SMITH. H. T. 1809. K. B. 10 East, 476.

Proof that toll has always been taken for a commodity sold in the market by sample, which, on the preceding market-day, had been brought in the market in bulk, and afterwards removed to the warehouse for want of buyers, for forty coupled with proof of toll having been taken for the last forty years on all sales by sample of such commodity, was holden evidence whence a general right to toll on sales thereof by sample may be inferred, though a time is remembered when it was not taken.

But an usage that toll has been taken on sales by sample, is sufficient to support a

\* If it can be shown that the ownership in the soil of a highway was originally in such a general one, and that, as well that as the right to a toll thorough the passage over the soil were right to coeval, it will be presumed that the right of way was originally granted subject to a toll; such toll.† and so the toll will be *prima facie* valid. The party disputing the right will then have to show that the right of way existed before toll was claimed; Lord Pelham v. Pickersgill, 1 T. R. 660.

† A prescription to a toll for passing an ancient navigable river through the plaintiff's manor is bad in law; the Mayor, &c. of Nottingham v. Lambert, Willes, 111.

‡ Toll is not incident of common right to a fair or market, but must be by prescription or grant: reasonable toll lies in grant, not excessive toll: toll of common right is due for live cattle; and for other things, stallage and pittance, are only due to the owner of the soil; Mo. 474; Holloway v. Smith, Stra. 1171; Anon. 7 Mod. 12. No toll is due by law but for goods sold, unless by special custom; Leight v. Pym, Lutw. 559. A capital burgess cannot be disfranchised for preventing the corporation from receiving a toll pretended to be due to it by prescription; Rex v. Vicars, 11 Mod. 214. A toll in Penzance market, belonging to the crown in right of the Duchy of Cornwall, is not discharged by a grant from the crown, exempting the inhabitants of Penzance from all and all manner of toll, pontage, stallage, &c., all which King John had granted to them to be discharged from; for King John never had the toll belonging to the crown in right of the duchy: but if the

[ 97 ] 3. *Tewkesbury Corporation v. Distow*. E. T. 1805. K. B. 6 East, 348. a; S. C. 1 Smith, 508.

But a right to toll on all wheat brought in to and sold at a market place to a bulk sold in the market by sam-  
A corporation being entitled by prescription to toll on all wheat brought into the market and sole on a market-day, but in which, of late, it had become the practice to sell by sample, and upon which sale by sample they had claimed the like toll for corn sold in the market; held that where A. bought of B. in the market by sample, to be delivered in the borough, A. knowing B. not to be a freeman, exempt from the toll, and the corn not to have been in the market, and the toll not to have been paid, and which corn was the next day delivered, the corporation could not maintain case against A. for such sale in fraud of the toll.

### III. COMPUTATION AND EXEMPTION FROM. As to the Exemption from, see *post*, tit. Turnpike.

*Chamberlain v. Longhurst*. M. T. 1775. K. B. Cowp. 365.

The computation of an additional toll is according to the progressive proportions named in the statute for the regulation thereof.  
In case for money had and received to the plaintiff's use. The facts at the trial appeared to be as follows:—The plaintiffs were owners of a waggon which passed loaded through a turnpike belonging to a turnpike-road, called the Kent-road. The defendant was appointed by the trustees of that road a collector of tolls, and to weigh carriages passing on the said road, under the stat. 13 Geo. 3, c. 84, and 14 Geo. 3, c. 82, among other acts. The plaintiffs' waggon weighed eighteen hundred overweight; the defendant insisted on being paid at the rate of 2s. per hundred for the whole overweight; which, by that mode of calculation, amounted to 18l., and was paid accordingly. Upon the general issue pleaded, a verdict was found for the plaintiffs for 13l. 8s. 1d. and costs, subject to the opinion of the Court on the following question, whether the defendant ought to have received at the rate of 20s. per hundred for more than three hundred weight of the eighteen hundred overweight? For the plaintiffs it was insisted that so much of stat. 13 Geo. 3, c. 84, as empowers the trustees to make an additional 20s. per hundred for every hundred overweight was repealed by stat. 14 Geo. 3, c. 82, s. 2, and that the sum to be taken as an additional toll for the overweight in this case ought to be calculated according to the following proportions mentioned in this latter statute, viz. 3d. per hundred weight for the first and second hundred weight; 6d. for every hundred weight above two, and not exceeding five; 2s. 6d. for every hundred weight above five, and not exceeding ten; 5s. for every hundred weight above ten, and not exceeding fifteen; and 20s. for every hundred above fifteen, which would have amounted to only 4l. 19s. 9d. in all, instead of 18l., which was the sum demanded of and actually paid by the plaintiff. And of this opinion was the Court.

*Per Cur. Postea* delivered to the plaintiff.

### IV. GRANT OF.

*The Corporation of Carlisle v. Wilson*. E. T. 1804. K. B. 1 Smith, 207: S. C. 5 East, 2.

A grant of toll payable for every horse drawing the cart containing specific goods applies to whatever description of carriage it may be levied on.  
This was an action for toll thorough claimed by the Corporation of Carlisle on goods carried for hire, and brought into the city. The claim to toll generally was founded on an ancient charter, granting to the Corporation *theolonium forinsecum et intrinsecum*, and was also proved by prescription; and it was clearly established in evidence that from time immemorial a toll of 1d. had been taken for every horse carrying goods, and also of 2d. on each horse drawing a cart carrying goods. The right to toll on goods, carried for hire by a pack horse, or in a cart, was clearly proved by prescription; but toll, in grant had been general, without referring to the tolls which the kings of England formerly had in this market, it would have been a good grant of exemption; *Hill v. Priour*, 2 Show. 31. A prescription for toll for setting his goods on land within plaintiff's manor, held good without consideration; *Crispe v. Belwood*, 3 Lev. 424. A prescription generally for toll of all goods brought within the limits of a certain manor is bad, for every prescription to charge the subject with a duty must import a benefit, and show the reason why it is claimed; *Warrington v. Moseley*, 4 Mod. 319; Comb. 297. S. C.

this case, was claimed for a box carried in a stage coach, of which the defendant was the proprietor; and there was no evidence given of any toll being paid on such goods, except in some instance where the goods, principally fish, were brought into Carlisle in a cart, and then put into the coach to be carried on further. At the trial before Chambre, J., he thought the right to toll on goods carried in carts was clearly established; but, upon leaving the case to the jury as to the payment of toll for goods carried in stage coaches, they found a verdict for the defendant.

Lord Ellenborough, C. J., thought that the right to toll was sufficiently proved; substantially, the right to toll, he thought, accrued on the carriage of the goods, whether carried on the backs of horses or in carts, or coaches, or barouches, or in any other vehicle of modern invention for carrying by land. That the reason why the toll had not been taken for many years was that, when stage coaches were first established at Carlisle, it was proved to be unusual to carry goods, so that it was of no importance to the Corporation to claim it. It is more convenient for the community at large that the toll should be taken of the carrier rather than of the proprietor, and it would be less burdensome upon the public; for if it were to be received of the proprietor, it must be charged upon each box or parcel; whereas, it would now be estimated only upon the coach or other carriage. He observed that stage coaches were but recently introduced into the northern counties. Bishop Nicholson, in his History of Cumberland and Westmoreland, written in 1710, says, he was obliged to travel as far as Stamford before he could get to a stage coach, when coming to London with a gentleman to whom he was tutor.

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## V. ACTION FOR.\*

1. STEINSON V. HEATH. T. T. 1693. C. P. 3 Lev. 400. n. S. P. ANON. 7 Mod. 12.

A declaration in case stated that the plaintiff was possessed of a toll traverse for passage on the bridge of Ware, and that the defendant had carried so many carts of barley over the bridge; the toll whereof at such a rate by the cart amounted to 40s., which the defendant had not paid, but refused to pay it, intending to defraud him, to his damage 10*l*. Whereunto the defendant demurs generally; and now it was argued for the defendant; 1st. That no such action lies for toll traverse for passage through the highway, without showing a title and a consideration. 2nd. That his action is only for a nonfeasance, viz. nonpaying, for which an action of case does not lie, but debt, if any toll be due. To which it was answered, 1. That the action lies without showing the title or the consideration in the declaration, for it shall come in the evidence, Cro. Jac. 43, 123, Dent v. Oliver, Ow. 109. And, as to the 2nd. that case lies as to the nonfeasance, Cro. Jac. 446; Moyler v. Gray, Hill, 2 Hen. 7 Pl. 9, against my shepherd for negligently keeping my sheep; and 7 Hen. 4, 14, against my carter for negligently keeping my horses; and 11 Hen. 4, 82, 83, for not repairing a bridge by which I am to pass; 1 Eliz. 3, 4, against a champion *qui se retrahit*; and 28 Hen. 6, 46, 47, against a chaplain for not reading prayers; 39 Hen. 8, c. 18, 19, against an innkeeper who refuses to lodge me.

And general indebitatus assumpsit lies for tolls.

An averment in a declaration by the owner of a market claiming toll in specie, that he is entitled to toll for goods sold in the market, means exclusively

2. MOSELY V. PIERSON. M. T. 1790. K. B. 4 T. R. 104.

In this case the question was, whether a claim of toll to be taken in specie for goods sold in a market, is supported by evidence of a right to toll for goods brought into the market and there sold, without showing any right to toll for goods sold in the market, without being brought there.

Lord Kenyon, C. J. There is no doubt of the law on this subject, for most unquestionably the plaintiff must prove his claim as it is laid in the declaration. But the only question is on the legal meaning of the word "sold," as it is here used; there may indeed be a sale by sample in fraud of a market, but not *quo* sale in the market; for the expression a "sale in a market" imports

\* In an action for disturbance of toll, the plaintiff need not set out his title, but may declare merely on his possession; 2 S. um. l. 113. b. 114.

toll for goods brought in to the market.

that the goods sold are brought into the market, and ready to be delivered to the purchaser. Now here the claim is of a toll in specie, which necessarily implies that the commodity in respect of which the toll arises is brought into the market.

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Ejectment lies by a mortgagee for a portion of the toll and toll-house.

3. *DOE, D. BANKES, v. BOOTH*. T. T. 1800. C. P. 2 B. & P. 219.

The trustees under a turnpike act, having demised to one of several mortgagees such proportion of the tolls arising from the road, and of the toll-houses and toll-gates for collecting the same, as the sum advanced by him bore to the whole sum raised on the credit of the tolls, the mortgagee brought ejectment for the toll-houses and toll-gates, in order to repay himself the interest due: held that he might well maintain his action, notwithstanding a clause in the act that all mortgagees should be creditors upon the tolls in equal degree; *Doe d. Banks, v. Booth*, 2 B. & P. 219.

A freeman of a corporation disfranchised without having been summoned cannot be examined as a witness in the case of a toll claimed by the corporation.

4. *BROWN v CORPORATION OF LONDON*, M. T. 1709. 11 Mod. 225.

Upon an issue joined upon a prescription for a toll, the defendant produced a witness. The plaintiff objected that he was a freeman and interested. Upon which the defendant produced a judgment in the Mayor's Court, whereupon a *scire facias* had been awarded, and two *nilis* having been returned, they had given judgment of his disfranchisement. But upon inquiry, the man said he never was summoned, and knew nothing of his disfranchisement therefore the proceeding must be irregular.

Holt, C. J., would not admit the man to give evidence, because the judgment in the Mayor's Court may be avoided.

## VI. DISTRESS FOR.

*BLAKEY v. DINSDALE*. M. T. 1777. K. B. Cowp. 661.

Toll on goods fraudulently sold out of a market cannot be distrained for.

This was an action of trespass, for seizing and taking away the plaintiff's wheat. The defendants pleaded: 1st. The general issue. 2ndly. That the borough of Ripon was an ancient borough, and that within the said borough, and from the time whereof the memory of man is not to the contrary, there has been an ancient market held every Thursday for buying of corn and grain, and that the corporation were entitled to receive for toll one half pint out of every bushel of corn brought to the market for sale; and then justified the taking as servants of the corporation. 3rd. Plea. Prescribing for toll of all corn brought into the borough of Ripon for sale on a market day. 4th. Plea. Prescribing for toll of all corn brought into the borough of Ripon for sale in consideration of cleansing and sweeping a large street in the borough, for the receiving and standing of all corn brought within the said borough for sale. Replication *de injuria sua propria absque tali causa*.

Lord Mansfield. Whether this corn was, on the day of the trespass complained of, brought within the borough of Ripon to be sold in the market is the question for our decision; the case states directly the contrary, for it states that the contract was made long before, on the Thursday; when the sample was shown; and that it was actually sold at that time. The day it was seized for not paying toll, it was only passing through the borough, in the road to the plaintiff's mill, which was ten miles off. As to the suggestion, that this is a fraud upon the corporation, there are cases by which a man cannot defend himself, even by facts ever so strong, in support of a fraud, if the fraud can be got at, but then it must be made appear. If this mode of sale is a fraud upon tolls, the remedy of the corporation is by a special action on a case. I remember a case of that sort by the City of London against persons for bringing corn first by sample to the market, in order to avoid the toll; and on a special action upon the case the fraud was found; but this case, as stated, is a very different thing. Here the vendor lives in the town, shows a sample of corn to a customer, who agrees for a certain quantity, to be delivered at his mill ten miles off, and the goods happen, on a market-day, merely to pass through the market in the way to the place where they were intended to be delivered. If it is really a trick, the defendants must bring an action on the case. The three other judges concurred.

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VII. OF THE WRIT DE ESSENDO QUIETUM DE THEOLOGIO.\*

**Tort.** *When the Action should be in, or in Assumpsit, See ante, tit. Action.*

**Tortious Conversion.** *See post, tit. Trover.*

**Tower Hamlets.** *See ante, tit. Requests, Court of.*

**Transcript.** *See ante, tit. Error, Writ of.*

**Trade.**

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VI. ——— RESTRAINTS OF.

(A) BY STATUTE, p. 105.

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XI. ——— ACTIONS, INFORMATIONS, AND INDICTMENTS, FOR EXERCISING A TRADE NOT DULY QUALIFIED, p. 110.

I. RELATIVE TO WHAT ARE, OR ARE NOT, TRADES.

1. MUSICIAN COMPANY V. GREEN. H. T. 1723. K. B. 8 Mod. 211.

A bye-law was made in London, that no person but a freeman of that city should exercise any trade or art therein, under such a penalty. Mr. Green, not being free of the City of London, played as musician at several City entertainments, particularly at the feast of the Sons of the Clergy, for which he was sued in the Sheriff's Court in London for using the trade of a musician, not being free of the City, which cause was removed into this court by *habeas corpus*. It was insisted for him, that he was a musician, and attended with other masters in music at the feast of Clergyman's Sons, being employed by the stewards of the said feast; and because they did not likewise employ the City musicians, therefore they set up this prosecution against the defendant, and would now extend this bye-law to music, which is a science, and not a trade. It was argued for the plaintiff, that a *procedendo* should be granted, for that the commitment was good, and so was the bye-law.

2. KEEBLE V. HAKERGILL. M. T. 1678. 11 Mod. 130.

Holt, C. J., delivered the judgment of the Court. The declaration was, that the plaintiff was lawfully possessed of a close of land, and a decoy there- in; and that the defendant knowing it, and intending to deprive him of the benefit thereof, and to hinder the ducks from coming to the decoy, did, on divers times, shoot off and discharge guns, &c. maliciously; and a verdict was given for the plaintiff. A decoy for wild ducks is a kind of trade.

\* It is returnable in the first instance; Corporation of Lynn v. Corporation of London, 4 T. R. 130; 6 T. R. 778; 1 H. B. 206; 1 B. & P. 487; abridged ante, tit. Corporation.

found for the plaintiff. First, this decoy is a benefit to the plaintiff, and in nature of trade, and there is the same reason that he should be repaid in damages for his decoy as for any other trade.

## II. RELATIVE TO THE QUALIFICATION FOR TRADING.

See *ante*, tit. Apprentice; \* Corporation.

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## III. RELATIVE TO TREATIES AS TO, AND OF TRADING BY NEUTRALS.

Under the treaty of 1794 between Great Britain and America, it was not necessary that the trade conceded to the Americans by the 12th article should be direct from America to the British settlements in the East Indies.

1. WILSON V. MARRYAT. M. T. 1798. 8 T. R. 31; S. C. 3 B. & P. 430.

One question in this case was, whether, under the late treaty between this country and the United States of America, it is not necessary that the trade from America to our settlements in the East Indies should be direct, or if it may be carried on circuitously by the way of Europe. The next objection arises on the construction of the 13th article of the treaty between this country and America, which has been confirmed by act of parliament. It was contended that the intercourse must be immediate and direct between America and the East Indies on the true meaning of that article; but in the fullest consideration that we can give, comparing this with the other articles of the treaty, we are also of opinion that this objection is unfounded; that the party insured might have come from America to other countries in Europe, and have bought goods, and carried them back to America, and from thence to the East Indies seemed to be admitted. Then, in point of reason, why may not that which may be done indirectly be done directly? and on the fair construction of the words of this article, we think this objection cannot prevail.

2. GIBSON V. MAIR. M. T. 1813. C. P. 1 Marsh, 39, S. P. GIBSON V. SENNE. E. T. 1817. 1 Stark. 119; S. C. 5 Taunt. 433.

A neutral meeting by agreement a British vessel for the purpose of receiving gunpowder and arms is illegal and a ground of condemnation, tho' the latter should have a licence to export them for the purposes of trade. †

Action on a policy of insurance, dated the 20th of May 1806, on the American ship Washington, at and from her arrival, twenty-four hours on the coast of Africa, during her stay and trade there, and till the delivery of her cargo at Charleston, in South Carolina. The ship sailed from Liverpool on the 2d of June; arrived in August in the river Congo, and during her stay there on the 9th of August, was taken by the Prince of Orange British privateer, which carried her to Surinam, where she was condemned. The plaintiff averred the loss to have been; 1st. By unlawful seizure. 2nd. By barratry. The cause was tried by Lord Chief Justice Mansfield, when the plaintiff called a witness, who stated that the boatswain of the Washington had been put in irons after the ship's seizure by the Prince of Orange, charged with an attempt to rescue and run away with the vessel. On his cross-examination he said, they had met the ship Croyden, by agreement in the river Congo, which supplied them with gunpowder and muskets, for the purpose of trading in slaves. On the part of the defendant the sentence of condemnation was read, and the stat. 29 Geo. 2. c. 16. The order in council of the 11th of May, 1803, giving the licence to the Washington to carry arms sufficient for her defence, but not for the purpose of trade, and the protest of the supercargo, stating that the ship had been seized by the Prince of Orange, on pretence of having powder and muskets on board, contrary to her licence were read. On this evidence the jury found for the plaintiffs. But the Court directed a nonsuit.

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\* The 5 Eliz. c. 4. prohibiting the exercise of certain trades, unless by a person apprenticed thereto for seven years, repealed by 54 Geo. 3. c. 96. with a saving clause for the customs and bye-laws of London and other cities, and of corporations and companies lawfully instituted. See *ante*, tit. Apprentice.

† But a neutral ship may carry enemy's property from its own to the enemy's country, without being guilty of a breach of neutrality, provided that neither the voyage nor commerce be of a hostile description, or otherwise expressly or impliedly forbidden by the law of this country, although such ship, in consequence of carrying enemy's property, be liable to detention, or to be carried into British ports for the purpose of search; *Barker v. Blakes*, 9 East, 283.



#### IV. RELATIVE TO CONTRABAND GOODS, AND HEREIN OF EXPORTATIONS.\*

##### 1. SMYTH v. REYNOLDS. E. T. 1765. C. P. 2 Wils. 257.

Trover for 150 casks of butter. Upon not guilty, there was a verdict for the plaintiff subject to the opinion of the Court upon this short case: The plaintiff's ship was lying in the river Thames, with the butter on board brought from Ireland; the defendant (a Custom-house officer) went on board, and before the hatches were opened or bulk broken, or any goods landed or offered for sale, seized the butter as contraband. The single question was whether the seizure was lawful. *Per Cur.* We are all of opinion that the seizure was unlawful, and that there was no right to seize, unless the goods be landed or offered to sale. The mere bringing the ship into port gives no right to seize; and this is our opinion grounded on the stat. 18 Car. 2. c. 2. and 20 Car. 2. c. 7. So there was judgment for the plaintiff *per totam Curiam*.

##### 2. WILLIAMS v. MANHILL. 1 Moore, 168; S. C. 7 Taunt. 468.

The Court held, that unless a vessel receive her clearing note, and other necessary documents, from the proper officer at Gravesend, it not such an exportation of the goods as will protect the cargo although she left the port of London, and observed the usual formalities of clearing at the Custom-house there.

Contraband goods can not be seized before landing or an offer for sale.

A clearing at the Custom-house is not deemed an exportation.†

#### V. RELATIVE TO THE LICENCES.‡

\* A privilege given by act of parliament to ships belonging to any state in amity with his Majesty and manned with foreigners, to import merchandize otherwise prohibited, does not extend to foreign-built ships British owned; *Attorney General v. Wilson*, 3 Price, 481; 4 Camb. 364. A ship, foreign built (American), belonging wholly to a British subject, and manned with foreign seamen (with an English mate), is not, as within the 43 Geo. 3. c. 153. entitled to import flax seed from Russia; *Attorney General v. Wilson*, 3 Price, 431.

† Unless a vessel has proceeded out of the limits of the port with her cargo, it is not such an exportation of the goods as will protect her cargo from the subsequent duties imposed on the exportation of goods of the same nature; although she is not only freighted and afloat, but has gone through all the formalities of clearing, &c. at the Custom-house, and has paid the exportation duties. And all such new impositions are laid on such goods attach while the vessel is water-borne within any part of the port; *Attorney General v. Porgett*, 2 Price, 331. As to the bond for seizing the shipping of glass, see *Attorney General v. Pole*, 1 Price, 386. previous to the 55 Geo. 3. c. 113.

‡ The disabilities ordinarily attaching upon alien enemies, or upon British subjects trading with them, may be removed by licence from the crown. As the king possesses the sole power of declaring peace or war, so he may remove the disabilities arising out of a state of warfare in favour of particular individuals, or of a particular portion of a community. See 15 East, 493; 5 Taunt. 697; 1 Ld. Raym. 243; 1 Rob. Adm. Rep. 199. 200; 2 Rob. Adm. Rep. 163. His Majesty, says Lord C. B. Comyn, may grant letters of safe conduct to an enemy, and by this means take him into his keeping and protection; see Com. Dig. Prerog. B. 5; Calvin's case, 7 Co 18. a 25. b.; *Casseres v. Bell*, 8 T. R. 166; *Well v. Williams*, 1 Salk. 46; 8 East, 287; 7 Hale, P. C. 165. And independantly of letters of safe conduct or passports, a person resident in this country by the licence and under the protection of the Sovereign, is not to be regarded as an alien enemy. See *Wells v. Williams*, 1 Ld. Raym. 282; 1 Salk. 46; S. C. Lutw. 35; Com. Dig. Ab. E. 4; 3 B. & P. 114; *Uspatrik v. Noble*, 18 East, 310; 1 Hale, P. C. 165; *Dyer*, 144. a.; *Sherley's case*, 2 Anst. 407. In like manner, an insurance may be effected upon the interest of an alien enemy under the protection of a licence from the crown; *Hullman v. Whitmore*, 3 M. & S. 338. 340; *Flindt v. Scott*, 5 Taunt. 647; *Vandych v. Whitmore*, 1 East, 486; *Gregg v. Scott*, 1 Holt, 131; 2 Rob. Adm. Rep. 163; *Kensington v. Inglis*, 8 East, 273. 280. 286; 12 East, 303. In the course of the late war, the conflicting relations in which the different states of Europe were placed towards one another by the over-ruling power of France, rendered it necessary for the interest of Great Britain that the prerogative of granting licences should be frequently called into exertion. Acts of parliament were also passed, by which, powers were given, during the war, to the King in council, and to the Secretary of State, to a greater extent than the King's prerogative was alone sufficient to authorize; and, in particular, of granting in certain conjunctures dispensations from the navigation laws, which, being the statutes of the realm, could not be encroached upon by the unassisted prerogative of the crown; see *Shiffner v. Gordon*, 12 East, 293; 1 Action, 223; statutes 48 G. 3. c. 37. s. 3; 48 G. 3. c. 153. s. 15. 16; 45 G. 3. c. 34; 4 G. 3. c. 3; 47 G. 3. c. 37. s. 2; 49 G. 3. 60; 49 G. 3. c. 25. The licences so issued were in general granted to British subjects, but sometimes to alien enemies, and generally for certain voyages either to or from an enemies country; either to export commodities with which the British markets were overstocked, or

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## VI. RELATIVE TO RESTRAINTS OF.

(A) BY STATUTE. See *ante*, Div. II., and tit. East India Company.

to import such articles as they stood in need of. Much contrariety of opinion existed with respect to the construction to be put on these licences; and in particular on the subject now immediately under our consideration, whether to any, or to what extent a licence of this kind operates to remove the personal disabilities of an alien enemy who may be interested in the property: being a high act of sovereignty, care must be taken that the licence is not extended beyond the intention of the power from which it emanated; and that it is not by too great a latitude of interpretation made auxiliary to the purpose of fraud; but subject to this limitation, the rule is, that the licence shall receive a liberal construction to effectuate the purpose for which it was intended, and that the terms which it contains are not to be limited in construction, where the adventure contemplated has been fairly pursued. It should be remembered, that the licence is granted not so much for the benefit of the individual upon whom it is conferred, as for the promotion of the national interest; and the strictness of interpretation, which may be applicable in the case of a grant of property from the Crown, cannot be exercised towards such an instrument.

A licence of this nature then, legalizing a particular adventure, incidentally legalizes all the measures necessary to be adopted for its due and effectual prosecution; it therefore impliedly allows a person whose commerce it authorizes, although he be an alien enemy, to protect his interest by insurance; and a British agent, in whose name the insurance is effected, may bring an action upon the policy even during the continuance of the war; *Kensington v. Inglis*, 8 East, 273; *Flindt v. Scott*, 5 Taunt. 709; *Fenton v. Pearson*, 15 East, 419; *Morgan v. Oswald*, 3 Taunt. 368; *De Tastet v. Taylor*, 4 Taunt. 248; *Fayle v. Bourdillon*, 3 Taunt. 546; *Hullman v. Whitmore*, 3 M. & S. 337; 7 Taunt. 448. A native Spaniard, domiciled here in time of war between this country and Spain, having been licensed in general terms by the king to ship goods in a neutral vessel from hence to certain parts of Spain, was held competent to effect an insurance on goods embarked in the protected commerce, and to sue in his own name on such insurance, as well in respect of his own interest, as for the benefit of his correspondents abroad; *Usparecha v. Noble*, 18 East, 332; 3 Taunt. 568; 5 Taunt. 700, 701.

A licence granted to certain British subjects on behalf of themselves and others to export in a specified ship bearing any flag, except the French, a cargo from London to Archangel, being an enemy's port, and to import from thence, in the same ship, certain articles of a particular description to any port in the United Kingdom, notwithstanding all the documents which accompanied the ship and cargo may represent the same to be destined to any neutral or hostile port, and to whomsoever such property may appear to belong, *Edw. Lead. Dec. Brit. Lir.* 20; 3 Taunt. 558, is considered capable of protecting a cargo, either outwards or homewards, which is either in whole or in part the property of an alien enemy; *Hulkman v. Whitmore*, 3 M. and S. 337; *Rucher v. Anseley*, 5 M. and S. 25; *Flindt v. Scott*, 5 Taunt. 674; *Anthony v. Moline*, 5 Taunt. 711, 715; *Schahong v. Andrews*, 5 Taunt. 716, 719; *Robinson v. Morris*, 5 Taunt. 720, 725; *Barrett v. Myer*, 5 Taunt. 824, 828, 829; *Feire v. Bell*, 4 Taunt. 4; *Fayle v. Bourdillon*, 3 Taunt. 546; *Robinson v. Tournay*, 1 M. and S. 217; 3 Camp. 158. S. C. not S. P.; *Hagedorn v. Barrett*, 2 M. and S. 100; 5 M. and S. 81, *Mennett v. Bonham*, 15 East, 477; *Flindt v. Scott*, 15 East, 526. Therefore, British subjects who are connected with the adventures, or are agents for the shipper, may effect an insurance for his benefit, though he was an alien enemy, and may maintain an action upon the policy. But it is incumbent on a person insured, who claims the benefit of a licence of this description, if he be not the actual grantee to connect himself in some manner with the licence, which may be done by showing that the person to whom it was granted was his agent; *Bush v. Bell*, 16 East, 3, *Feize v. Newnham*, 16 East, 197; *Robinson v. Morris*, 5 Taunt. 720; *Rawlinson v. Janson*, 12 East, 223; *Barlow v. McIntosh*, 12 East, 311; *Butler v. Allnut*, 1 Stark. 222. For if this rule were not observed, a licence might be set up to sale; and it is not sufficient to show that the ship's name was indorsed upon the licence at the hostile port of loading; 5 Taunt. 720.

A general licence must be applied by evidence to the particular case in judgment; it makes part of the title of the party claiming to be licensed to show how he obtained possession of a licence, which in the terms of it is general, it makes part of the plaintiff's case against the underwriter to connect himself with the property insured, and to show that it was lawfully insured; 12 East, 228. A misdescription in the addition of the person to whom the licence is granted; as, for instance, stating his residence to be in Heligoland instead of London, has been held to invalidate the licence, although the objection is said to have been immaterial at the licensing office; *Klingender v. Bond*, 14 East, 484. A licence from the king to a particular person to import commodities of a certain description, being the property of a person specified, cannot be assigned so as to authorize the importation of goods which are the property of the assignee; *Feize v. Thompson*, 1 Taunt. 121.

So, where the goods licensed were, by the terms of the license, to be "the property of J. B. & Sons, as specified in their bills of lading," it was considered that the goods were not protected by a general bill of lading consigned to Messrs. Baker, who possessed not even a qualified property, absolute bills of lading being transmitted to other persons as the parti-

(B) BY GRANT OF THE KING.

MERCHANT ADVENTURERS v. REBOW. T. T. 1987. K. B. 3 Mod. 131. [ 106 ]  
 The question is whether the king can make such a grant, excluding all the king Grants of others from trading; for it is expressly provided by stat. 12 H. 7. c. 6. that no Englishman shall take of another any fine or imposition for his liberty to buy and sell; all patents prohibiting trade are void. [ 107 ]

(C) BY BYE-LAWS. See *ante*, tit. Corporation.

(D) BY CUSTOM. See *ante*, tit. Custom.

(E) BY PRIVATE CONTRACT.

1. CLERK v. TAYLOR'S COMPANY. M. T. 1685. K. B. 3. Lev. 241. S. P.

CLARKE v. COZEN. H. T. 1774. Ca. Temp. Hard. 52.

Error on a judgment in B. R., in debt on an obligation conditional that the defendant below should not use the trade of a taylor in Exeter. Where the defendant pleads that he was an expert taylor, and skilful in the art thereof; and the plaintiffs below, pretending that none who was not a member of their corporation ought to use their trade there, did many weeks vex and trouble him, and he to prevent such vexation, gave to them the said obligation, which is contrary to law, and void. The plaintiffs replied that the defendant sealed and delivered the said obligation as his deed; and it was adjudged in B. R. that the obligation not restraining the trade generally, but only in a particular place, viz. Exeter, was not void. Whereupon the defendant brought a writ of error in the Exchequer Chamber, and error assigned was only in point of law, viz, whether the said obligation was void; and, after divers arguments in Trinity term, and this term, and also in the following Hilary term, it was held by all the judges that the judgment in B. R. was erroneous, and the obligation void.

2. MERCHANT ADVENTURERS v. REBOW. T. T. 1687. K. B. 3 Mod. 128; 7 Mod. 230. [ 108 ]

*Per Cur.* A custom to restrain a man from exercising his trade in a particular place has been adjudged good; as, to have a bakehouse in such a manor, and that no other should use that trade there; and as a man may be restrained by custom, so he may restrain himself from using a trade in a certain place, as if he promise upon a valuable consideration not to use the trade of a mercer in such a place.

3. CLERK v. TAYLORS' COMPANY. M. T. 1685. K. B. 3 Lev. 332.

*Per Cur.* A man may restrain himself from using a trade in a particular consignee; Faizo v. Walters. 2 Taunt. 248. A license to a British merchant, on behalf of himself and other British or neutral merchants, to import a cargo from certain limits, within which an enemy's port is situate, in a vessel bearing any flag except the French, will protect a ship trading in the manner specified in which the British merchant and an alien enemy are jointly interested, provided the vessel be not French; Therefore, such interest has been held insurable; Hagedorn v. Reid. 1 M. and S. 567; 3 Campb. 377. S. C.

So, a licence granted to C. and H., who were ship-owners in London, on behalf of themselves and British or neutral merchants, to load and export a cargo on board the Russian ship *Fortuna*, from London to any port in the Baltic not under blockade, was held to protect Russian property exported from this country on a voyage to a Russian port, Russia being at war with Great Britain; *Rucher v. Anstey*, 5 M. and S. 25. But a licence granted to a vessel to sail in ballast from London to Holland, which country was at that time in a state of hostility, notwithstanding any thing contained in his Majesty's order of council of the 20th of April, 1809, was held not to protect a ship which was the property of an alien enemy, and the insurance on the vessel was determined to be void; *Gregg v. Scott*, 4 Campb. 339; 1 Holt. 129. S. C. In this case the licence appeared to be only a dispensation with the order in council, and was not intended as a remission of the belligerent rights of the crown. If the licence granted be conditional, it is incumbent on the party who seeks to protect himself under it to conform to its requisitions; *Vandyck v. Whitmore*, 1 East, 475; *Morgan v. Oswald*, 3 Taunt. 554. If the conditions be only colourably complied with, the licence will be avoided by reason of the fraud; *Gardon v. Vaughan*, 12 East, 302.

\* And even now an agreement contrary to public policy, and injurious to the community at large, is also invalid. As, for instance, a stipulation in general restraint of trade; to engage, for example, not to carry on a trade in any part of England; if indeed the contract be only for a limited restraint of trade, and founded on consideration, is invalid; *Marshall*, 378.

ment be not by special ty. ticular place, if there be a consideration, though the agreement be not by specialty.

## VII. RELATIVE TO STATUTES AS TO.

### 1. LUBBOCK v. POTTS. 3 Smith. 401; S. C. 7 East, 449.

Under 12 Car. 2. colonial produce of the plantations cannot be transported from thence direct to any place in Europe.† In an action on a policy of insurance on ship and goods, British property, at and from Trinidad to Gibraltar, with liberty to touch ship and exchange property at any one of the West India Islands, particularly at Martinique, against all risks, British capture, seizure, and detention, including loss by perils of the sea, several questions were made: first, as to fraud, which was given up; and next as to the legality of the policy; and lastly, as to the legality of the voyage under the navigation acts. And a verdict was taken for the plaintiffs, reserving the point as to the legality of the exception from the British capture, and afterwards a rule was obtained to show cause why the verdict should not be set aside and a nonsuit entered.

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The exception against British capture was added subsequently to the making of the policy, as follows: "I hereby agree, in consequence of the above mentioned letter;" wherein the correspondent was desirous of being made secure against all risk, and in consideration of five guineas per cent. additional premium to insure against all risks whatever, British capture, seizure, and detention included. The ship went first from Gibraltar to Martinique with fruits and wine, and thence to Trinidad, and took in sugar and coffee, plantation produce, and afterwards sailed for Gibraltar, and was lost in her voyage thither. She cleared out for Cork and London. By stat. 12 Car. 2. c. 4. s. 18. no sugar, tobacco, cotton, &c., or timber of the growth, production, or manufacture of any British plantation in Asia, Africa, or America, may be transported to any place whatsoever, other than to some British plantation, or to Great Britain, or to Ireland, upon penalty of forfeiting the ship and goods; and it was now contended, that, as this was an illegal voyage, and the ship and goods might have been forfeited, the plaintiff could not recover in this action.

Under 16 Geo. 3. A American property on board a neutral ship not trading to any port or place of the American colonies was not forfeited.†

### 2. TYSON v. GURNEY. M. T. 1789. K. B. 3 T. R. 447.

The stat. 16 Geo. 3. c. 5. which subjected to forfeiture all American ships and all other ships, with their cargoes, trading to any part of the colonies, does not extend to the property of Americans on board any other ship not trading in one of those ports; so that an insurance of the property of Americans to a Dutch ship from Amsterdam to St. Eustatia is not prohibited by that act.

A certificate of landing abroad goods exported pursuant to 11 and 12 W.

### 3. Rex v. WYSE. Forrest. 35.

The question was, whether a certificate, that goods exported pursuant to the stat 11 & 12 W. 3. c. 10. s. 2. were landed abroad, is not good evidence of that fact in a Court of Nisi Prius.

Macdonald, C. B. I am extremely glad this point has been made, as it is

\* As, where a defendant has been taken in as a servant without money, where a considerable sum might be reasonably expected; *Cheesman v. Ramby*, Fort. 298; *Stra.* 739; 2 *Ld. Raym.* 145. 146. S. C. A promise or bond not to use a trade in a particular place is void, if it be without consideration; but if it restrain generally, it is void, though there be a consideration; *Aleyn.* 67. So, a restraint with particular customers is good; 2 *Saund.* 156. A promise that, if a man exercises a certain trade in a market, he will pay 100*l.* is good; *Pa m.* 172. But if the breach of the condition does not apparently tend to damage of the obligee, the restraint is void; *Mitchell v. Reynolds*, 10 *Mod.* 133. 135. A bond, with condition not to buy sheep trotters of any person the obligee bought of, adjudged ill, as tending to a monopoly; *Hompson v. Harvey*, *Comb.* 121. 122. So, if it be a general restraint throughout England; 10 *Mod.* 28. 131. 132; 2 *Saund.* 156. If it be a total restraint in all places, for a certain time *Quære*; *Mitchell v. Reynolds*; 10 *Mod.* 85. 137.

† So, under the 15 Car. 2. the exportation of European manufactures from the Cape to any port to the eastward in his Majesty's possessions is void; *Gray v. Lloyd*, 4 *Taunt.*

§ 3. *Ann.* c. 7. is prospective in construction and operation, and a count on that point is not good; *Attorney General v. Jaggars*, 1 *Price*,

a question of great importance to the commercial world. These certificates are a very slender security on one hand; yet, on the other, it is very difficult to procure other evidence of the landing abroad. The act of parliament certainly makes it evidence for the commissioners; but the question is, whether it is to be also admitted as evidence before a jury. Another question arises in this case, whether this certificate should not have found its way to the Custom-house. The Court took time to consider; and, on a subsequent day, Macdonald, C. B., delivered their opinion:—We are of opinion that this certificate is not admissible evidence; it is nothing more than a declaration of two individuals not upon oath; it may be very good evidence to the commissioners, but not to the jury. The words of the act are:—"The examination and proof thereof being left to the said commissioners." The commissioners of the Customs may have time to investigate the validity of the certificate, but as the Court of Nisi Prius has not, it is not to be received as evidence there; therefore, the verdict must stand.—Rule discharged.

3 is not evidence there of, but should be proved by the signatures.

VIII. RELATIVE TO INFANTS TRADING. See *ante*, tit. Infant. [ 110 ]

IX. RELATIVE TO FEME COVERTS TRADING IN LONDON.

See *ante*, tits. Baron and Feme; London.

X. RELATIVE TO THE RIGHT OF SURVIVORSHIP AMONG JOINT TRADERS.\*

XI. RELATIVE TO ACTIONS, INFORMATIONS, AND INDICTMENTS, FOR EXERCISING A TRADE NOT DULY QUALIFIED. See *ante*, tit. Apprentice.

### Transportation.†

1. *REX v. WATSON*. M. T. 1821. Russ. & Ry. 468.

Upon statute 56 Geo. 3. c. 17. s. 8. which required the certificate to contain the effect and substance, only omitting the formal part of the indictment and conviction, and order for transportation, it was held, that an indictment which stated that the prisoner had been convicted of felony, without stating the nature of that felony, and a certificate which stated only that the prisoner had been convicted of felony, were insufficient, and the prisoner was remitted to his former sentence.

Formerly an indictment for turning from transportation must have stated the nature of the felony causing the conviction.†

\* Rights in actions belonging to traders surviving seem property in possession; *REX v. Liverpool Collector*. 2 M. and S. 223. See also *ante*, tit. Partners.

† The 5. Geo. 4. c. 84. repeals the several enactments in force for regulating transportation, and also the 43. s. of the 56 Geo. 3. c. 63. relating to the Penitentiary at Milbank. The 6 Geo. 4. c. 5. mutiny act, provides for the punishment of persons returning from transportation after sentence by a court martial.

‡ And in another case where a capital convict had a conditional pardon, and escaped, and the indictment against him stated that the King's pleasure had been notified to the Court, and the Court thereupon ordered, &c., according to the terms of the pardon, and it appeared that the notification was to the judge after the assizes were over, and that he made the order; the judges upon a case reserved, were unanimous that the notification to the judge, and the order by him, was not a notification to the Court, or any order by the Court, and that the indictment was not proved; but the late stat. 5 Geo. 4. c. 84. enacts that it shall be sufficient to allege in the indictment the order for transportation, without alleging any indictment, trial, &c. or any pardon or intention of mercy, or signification thereof: the late statute, however, requires that the certificate to be given in evidence shall contain the effect and substance of the indictment and conviction; and in a case which arose from a former statute, 6 Geo. 1. c. 23. which required that the certificate should contain the effect and tenor of the indictment and conviction, and of the order and contract for transportation, and also upon another statute, 24 Geo. 3. c. 56. s. 5. which required a certificate containing the effect and substance only, omitting the formal part of the indictment and conviction, the indictment stated that the prisoner was convicted of grand larceny, within benefit of clergy (now abolished); and the certificate was in the same form; and the judges upon the point being reserved, held that both were insufficient. So, where an indictment stated the condition upon which the royal mercy was extended, to have been

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The daily book kept at a prison containing entries of the prisoner's discharge, is evidence to prove the day of the discharge.\*

2. ANKLE'S CASE. 1 Leach. C. L. 391.  
The prisoner had received a pardon on condition of transporting himself beyond the seas, within fourteen days from the day of his discharge; and it was incumbent on the prosecutor to prove the precise day on which the prisoner was discharged; it was holden that the daily book of the prison containing entries of the names of the criminals brought to the prison, and the times when they were discharged, though generally made from the information of the turnkeys, or from their endorsements on the backs of the warrants, was good evidence to prove the time of the prisoner's discharge.

### Treason.

[ 112 ]

#### I. RELATIVE TO HIGH TREASON.

- (A) WHAT AMOUNTS TO, p. 112.
- (B) INDICTMENT, p. 113.
- (C) DEFENCE, p. 114.
- (D) EVIDENCE, p. 115.
- (E) PUNISHMENT, p. 116.

#### II. PETIT TREASON.

- (A) WHAT AMOUNTS TO, p. 116.
- (B) INDICTMENT, p. 116.
- (C) EVIDENCE, p. 117.
- (D) PUNISHMENT, p. 117.

general, but specifying that the prisoner should be transported to places specified, the variance was held to be fatal.

\* And it was held that though, if a convict on his trial for returning from transportation before his time was expired, should confess the fact, and acknowledge that he was the man, the Court would record such confession; yet, no such confession being made, it was necessary to produce the record of conviction, and give evidence of the prisoner's identity; 1 Hawk. P. C. c. 47. When a convict was sentenced to transportation for seven years and received a sign manual promising him a pardon on condition of his giving a security to transport himself for that period within fourteen days, and upon his giving such security was discharged from prison, but neglected to transport himself within the fourteen days, it was holden that he could not be indicted for being unlawfully found at large before the term for which he had received sentence for transportation had expired, on the ground that such sign manual, and the recognizance entered into in consequence of it, were good evidence that he was lawfully at large, although he had substantially performed the condition on which the promise of pardon was granted; Miller's case, 1 Hawk. P. C. c. 47; 1 Leach 74, 2 Black. R. 797; Hotham v. The East India Company, 1 T. R. 643.

In the last case the prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon was to be granted, that is, he was pardoned upon condition of transporting himself within fourteen days; Miller's case, 1 Leach, 76. And in another case it was holden, that a prisoner convicted of a capital crime, whose sentence was respited during the king's pleasure, and who, having received a pardon on condition of transportation for life, was afterwards found at large in Great Britain, without lawful cause should be referred to his original sentence. In a subsequent case where the prisoner having been convicted of simple larceny, had received judgment of transportation to America for seven years, but had afterwards been pardoned upon condition of transporting himself beyond the seas for the same term of years within fourteen days from the day of his discharge, and of giving security so to do; and, upon giving the security required, had been discharged but had not complied with the other part of the condition, by transporting himself, it was doubted whether he could be convicted of a capital felony in being found at large without any lawful cause before the expiration of the term, or whether he ought to be remitted to his former sentence. One of the judges thought that as the prisoner had not complied with the terms on which he was pardoned, he must be considered as having been at large without lawful authority, as soon as the fourteen days had expired; another judge considered it as a doubtful question whether the non-performance of the condition had not rendered the whole pardon null and void; and he also thought that the offence with which the prisoner was charged was not within one of the statutes then relied upon, namely, the 16 Geo. 2. c. 45. because he had not agreed to transport himself to America; and that it was not within another statute, 19 Geo. 3. c. 72. because that act related only to pardons granted to offenders, who had been convicted of felonies by which they were excluded from clergy. In the last mentioned case one point was clearly agreed upon, namely, that as the prisoner at the time of his discharge had a real intention to quit the kingdom within the time, but had been prevented from carrying it into execution by the distress of poverty and ill health, these impediments amounted to a lawful excuse.

## I. RELATIVE TO HIGH TREASON.

(A) WHAT AMOUNTS TO.\*

(B) INDICTMENT.†

[ 113 ]

\* As to the offence of high treason, 1 East, P. C. 37 to 138; 4 Bl. Com. 74 to 93; it is principally defined and regulated by stat. 25 Ed. 3, s. 5, c. 2; and 36 Geo. 3, c. 7.

The following enumeration of offences will show what amounts to treason:—1. The compassing or imagining the death of the king. 2. Compassing or imagining the death of the queen, or the eldest son and heir of the king and queen. 3. Violating the king's wife, or eldest daughter unmarried, or the wife of his eldest son and heir. 4. Levying war against the king in his realm. 5. Adhering to the king's enemies. 6. Counterfeiting the king's seals. 7. Killing his officers. 8. Concerning the coin. 9. Concerning papists and the king's supremacy. 10. Concerning the succession to the crown. 11. Seducing, or attempting to seduce others from their allegiance. 12. Desertion from the king's forces. These several heads of offence are fully commented upon in 1 East, P. C. 58 to 93. The treason must be established by proof of some overt act, or *apertum factum*, which must be laid in the indictment; 3 Inst. 5; 2 East, R. 21; 6 East, R. 426.

The acts to establish that the defendant did compass or imagine the death of the king as high treason, prohibited by 25 Ed. 3, s. 5, c. 2, are, 1. Actual killing; 1 East, P. C. 58. 2. Preparing means of death, East, P. C. 50. 3. Consultation; 1 East, P. C. 58. 4. Deposing or taking possession of king or government; 1 East, P. C. 59. 5. Overawing and subverting parliament; 1 East, P. C. 60. 6. Levying and consulting to levy war; 1 East, P. C. 62. 6. By constructive levying of war; 1 East, P. C. 63.

The acts to establish that the defendant did levy war against the king in his realm as high treason, prohibited by 25 Ed. 3, s. 5, c. 2, are, 1. All insurrections against the person of the king, whether they be to dethrone, imprison, or force him to alter his measures of government; or to remove evil councillors from about him; 1 East, P. C. 66. 2. Holding a fort, &c. against the king; 1 East, P. C. 68. 3. Joining with rebels in an act of rebellion; 1 East, P. C. 10. 4. Giving assistance or intelligence to rebels; 1 East, P. C. 74. 5. Constructive levying war, by insurrection, to reform supposed national grievance, &c.; 1 East, P. C. 72.

The acts to establish that the defendant was adherent to the king's enemies in his realm, giving them aid and comfort in the realm or elsewhere, as high treason, prohibited by 25 Ed. 3, s. 5, c. 2, are not limited or defined, but are principally, 1. Sending information to enemy of the state of forces, &c.; 1 East, P. C. 78. 2. Making war on king's allies; 1 East, P. C. 79. 3. Sending forces to assist enemy; 1 East, P. C. 78. 4. Any other assistance.

The acts to constitute high treason under 3 Geo. 3, c. 7, are, within the realm or without, compassing, imagining, inventing, devising, or intending, 1. Death or destruction, or any bodily harm, tending to death or destruction, maim, or wounding, imprisonment, or restraint of the person of the king, his heirs or successors; or, 2. To deprive or depose him or them from the style, honor, or kingly name of the imperial crown of this realm, or any other of his majesty's dominions or countries; or, 3. To levy war against his majesty, his heirs, or successors, within this realm, in order, by force or constraint, to compel him or them to change his or their measures or counsels; 1 East, P. C. 63, 66, 67; or, 4. To levy such war in order to put any force or constraint upon or to intimidate, or overawe, both, or either houses of parliament; or, 5. To move and to stir and foreigner or stranger with force to invade this realm, or any other of his majesty's dominions or countries, and in the obedience of his majesty, his heirs and successors; 1 East, P. C. 63, 78.

† The venue must be laid in a county in which an overt act of treason can be proved; but after proof of an overt act in one county, evidence may be given of any other overt acts of the same species of treason in other counties; 1

East, P. C. 125; 4 East, Rep. 177. And it is sufficient to lay the overt acts at any house in the county, though it be proved to have been in another place; 1 East, P. C. 125. In stating an overt act in sending letters to enemy abroad, it is better to state that the letters were sent from the place where the venue is laid to be delivered in parts beyond the seas; 1 East, P. C. 124. Intercepted letters are received as overt acts of treason in the county in which they were written; 2 Campb. 506. For treason out of the realm, the commission and indictment allege that the offence was committed without the realm. Every indictment for high treason must lay the offence to have been committed traitorously, 2 Ld. Raym. 870; Comb. 259; 1 East, P. C. 115; and should conclude against the duty of the defendant's allegiance; Comb. 259; 1 Ld. Raym. 11; 2 Salk. 630. In every indictment for high treason upon the stat. 5 Edw. 3, for compassing the death of the king, or of such of his family as are therein named, or for levying war, or adhering to his enemies, the particular species of treason must be charged in the very terms of the statute; as that the defendant did traitorously compass and imagine; and then some overt act must be laid as the means made use of to effectuate the traitorous purpose. The particular acts of compassing and adherence must be set forth; and in the other instances it must be alleged, that he assembled with a multitude armed and arrayed in a warlike manner, and levied war; 1 East, P. C. 58. 116; 2 East, 11; 6 East, 426; 1 Hale, 150; Kel. 8.

The indictment in 25 Ed. 3, s. 5, c. 2, for levying war against the king in his realm, must be expressly so laid; 1 East, P. C. 66; though we have seen there might be five overt acts afterwards laid. The indictment generally charges, that the defendants were armed and arrayed in a warlike manner; and where the case admits of it, with swords, guns, drums, colours, &c.; but this does not seem necessary, 1 East, P. C. 67, 116; levying war being an overt act of itself, no other act need be alleged, if it be expressly shown that what was done by the defendant was in a warlike manner; but merely to allege that the defendant levied war, would not suffice on this statute; 1 East, P. C. 116, 117. In an indictment on 25 Ed. 3, s. 5, c. 2, for adhering to the king's enemies in his realm, giving them aid or comfort in the realm, or elsewhere, this must be laid as the offence; though we have seen that there may be several overt acts establishing such offence. It is necessary to aver that the persons adhered to were the king's enemies; as well as that the defendant adhered to them; but it is not necessary to allege expressly that such adherence was against the king, that being apparent. Nor is it necessary that the parties should come to an action; but the special matter of adhering must be set forth; 1 East, P. C. 78.

One species of treason may be laid and proved as an overt act of another, 1 East, P. C. 62, 117; and, therefore, it is usual to insert in the indictment one count for compassing the king's death, showing the overt acts, and then to add a second for adhering to the king's enemies, and repeating the same

\* The defendant is by 7 W. 3. c. 3. and 7 Ann. c. 21. to have a copy of the indictment, including the caption, Fost. 229; 1 East, P. C. 113. ten days before the trial, with a list of the witnesses on the part of the prosecution, and of the jury; he is also to have two counsel assigned him, by whom he may make full defence; 1 East, P. C. 111. 884; Bl. Com. 354 to 356. As to the mode of appointing counsel, and the right to reply, see Burr. 643. 646. In case of high treason and misprison of treason, where the overt act alleged in the indictment is the assassination or killing of the king, or any direct attempt against his life, or to do him bodily harm, the defendant is to be indicted, arraigned, tried, and attainted, in the same manner, and upon the like evidence, as in the case of murder, but the judgment and execution is to be the same as in other cases of high treason, 39 and 40 Geo. 3. c. 93; the defendant, at and during trial, is not to be in irons; Kel. 10.



## (D) EVIDENCE.\*

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REX v. WATSON. T. T. 1817. N. P. 2 Stark. 116. 158.

A witness in high treason was described in the list delivered to the prisoner under the statute as lately abiding at a specified place; upon the examination of the witness upon the *voir dire*, it appeared that he had had a different and later place of residence. Lord Ellenborough observed, that with reference to the time of delivering the list the description must be as necessarily "as lately," unless the person delivering the list was actually at the place at the time; and therefore that the place described as the residence must be that which it had lately been; but that it would be proper to inquire as a matter of fact when the witness was resident there. In the course of the evidence for the prisoner, it appeared that the real name of the person who had been examined as a witness for the crown, and who had been described in the list of witnesses delivered according to the statute as J. H., No 6, Stangate Wall, Lambeth, and that he was not a stock-broker, as represented to be in the list. It was that, on the ground of this misdescription, his evidence ought now to be struck

The residence of the witness as must be stated accurately in the list given to the prisoner; but an objection on the ground of misdescription must be made in the first instance.†

overt acts. But it seems that no overt act can be given in evidence under any branch of treason, unless it be expressly laid as an overt act of such treason in the same indictment; 1 East, P. C. 117. But though some overt acts must be laid and proved in the instances before mentioned, yet it is not necessary that the whole details of the evidence should be set forth. The statute of William directs that no evidence shall be admitted or given of any overt act that is not expressly laid in the indictment against any person or persons whatsoever. The true sense of this clause is that no overt act amounting to a distinct, independant charge, though falling under the same head of treason, shall be admitted in evidence unless it be expressly laid in the indictment; but an overt act may be given in evidence, though it be not expressly laid, or not well laid in the indictment, if it amount to a direct proof of any overt act which is well laid; 1 Esp. P. C. 121. On the other hand, if the overt act offered in evidence and not laid in the indictment be no direct proof of any of the overt acts charged, but merely go to strengthen the evidence or suspicion of some of those overt acts by a collateral circumstance, such evidence cannot be admitted notwithstanding the opinion of Lord Hale to the contrary; if but one of several overt acts be well laid and proved, that is sufficient; and if it be laid with circumstances not necessary to constitute the act as high treason, they need not be proved, but may be rejected as surplusage. Neither is the time or place laid in an overt act charged in an indictment, more necessary to be strictly proved in this than in any other case, provided a time be laid before the finding of the bill, and a place be laid within the county; 1 East, P. C. 125.

\* In high treason against the king or government, there must generally be two witnesses as well to find the bill as on the trial, unless the defendant confess; 1 Edw. 6. c. 12. s. 22; 1 East, P. C. 128. 161: but one will suffice on indictment for direct attempt at the life of the king; 1 East, P. C. 129. And in other cases it is sufficient to have one witness to prove one overt act, and another witness to prove another overt act of the same kind of treason, Kel. 8, 9; and as to collateral facts, one witness suffices, 1 East, P. C. 130. And on an indictment for compassing the death of the king, and that defendant in pursuance thereof wrote divers letters to enemies, or held divers consultations upon that subject; evidence may be given of the prisoner's having written any treasonable letter, or attended any meeting held for treasonable purposes, 1 Campb. 400; and intercepted letters are received in evidence as overt acts of treason in the county where they were written; 2 Campb. 507. In an indictment against one conspirator in treason after proof of the conspiracy, evidence of an overt act by one of the conspirators will affect the defendant; 1 T. R. 527.

† Evidence admitted of a seditious speech spoken by the prisoner, although not set out in substance, as an overt act; Rex v. Watson, 2 Stark. 132. So, an officer of the Tower not permitted to prove that a particular plan of the Tower produced by the defendant is a correct one; *ibid.* But it is doubtful whether seditious questions and answers found in the possession of a conspirator, but not published, may not, from their close connection with the nature and object of the conspiracy, be read in evidence, although no positive and direct proof be given that the use was to be made of this or any other such instrument in furtherance of the design. If such evidence were to be given, the document would certainly be admissible.

out. But, *per* Lord Ellenborough, C. J. The objection ought to have been taken in the first instance, otherwise a party might take the chance of getting evidence which he liked; and, if he disliked the testimony, he might then get rid of it on the ground of misdescription.

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(E) PUNISHMENT.\*

## II. RELATIVE TO PETIT TREASON.

(A) WHAT AMOUNTS TO.†

(B) INDICTMENT.‡

[ 117 ]

(C) EVIDENCE.§

(D) PUNISHMENT.¶

\* When women are convicted of treason, the judgment is, that they be hanged by the neck until they be dead; 30 Geo. 3. c. 48. The judgment against a man is, by 54 Geo. 3. c. 46. to be, that defendant should be drawn on a hurdle to the place of execution, and be there hanged by the neck until he be dead; and that afterwards his head shall be severed from his body, and his body divided into four quarters, shall be disposed of as the king shall think fit; with power to the king by a special warrant in part to alter the punishment. A month's time has been allowed between entrance and execution; 1 Burr. 650, 651.

† Petit treason is only an aggravated description of murder; Foster, 107. 324. 836. All that is requisite to constitute the latter offence is equally necessary to complete the former; and it differs only in the relationship subsisting between the parties, and the obedience which is broken by the offender. The instances in which it can be committed were reduced to three by 25 Edw. 3. s. 5. c. 2. though at common law they were more numerous. These are—by a servant killing his master, a wife her husband, and ecclesiastical person, either secular or regular, his superior. A husband who kills his wife is not thus guilty, because no obedience is broken, which is the foundation on which this aggravation of murder rests. There may be accessaries to this crime both before and after the fact, as to any other felony.

‡ As all petit treason includes murder, it is contended by Lord Hale and Mr. Justice Foster, that a person guilty of the former may be indicted for the latter; 1 Hale, 378; Fost. 325. 328. But Foster thinks it advisable, where the prisoner is indicted for murder, and the evidence seems to prove him criminal in the higher degree, to quash the indictment and prefer another, because the judgment is different, and the prisoner, is entitled to thirty-five peremptory challenges, Fost. 327; and see the case of *Swan v. Jeffereys*, Fost. 104; and if, through a mistake on the part of the prosecutor, the prisoner should be indicted for a common murder, and the evidence should show that it is a petit treason, it will not be advisable to direct the jury to find a verdict of not guilty, in order to prefer another indictment, lest the defendant should plead the acquittal; but the jury may be discharged of the indictment for murder, and another preferred for treason; Fost. 328; at all events, there is no doubt that a defendant, if tried for petit treason, may be found guilty of murder if the indictment be properly framed, and this not only where the proof of the relationship fails, on which the aggravation depends, but where the fact itself, though satisfactorily proved by circumstantial evidence, is not supported by the evidence of two credible witnesses; 1 Leach, 457.

§ By the 1 Edw. 4. c. 12. s. 22. and 5 & 6 Edw. 4. c. 11. s. 12. to convict a man of either high or petit treason, two witnesses in open court, or a voluntary confession, are made requisite, 1 Leach, 457; though, where these cannot be procured, we have seen that the defendant may be convicted of murder; *Radbourne's case*, Leach, 363. In order to substantiate the relationship between husband and wife, on an indictment against the latter for petit treason, it is not necessary to prove the actual marriage, either by producing a copy of the register, or by the testimony of some one present at its celebration; but it will be sufficient to show cohabitation and the language of both parties respecting each other; 1 East, P. C. 377.

¶ Petit treason was first ousted of clergy (now abolished) by 23 Hen. 8. c. 1. to those who were convicted by verdict and confession; and by 25 Hen. 8. c. 3. to those who stood mute, challenged more than thirty-five, or refused to answer; these acts were rendered perpetual by 32 Hen. 3. c. 3. repealed by 1 Edw. 6. c. 12. and it is said revived by 5 & 6 Edw. 6. though the latter seems quite uncertain; 11 Co. 29. But the surest ground on which the clergy is taken away is under the words "wilful murder" in 1 Edw. 6; since we have seen that it is only an aggravated kind of murder, and subject, in a great degree, to the same rules, Fost. 350; 1 Hale, 340; and it is under these words only that clergymen are excluded from the benefit of their order, since their privileges are expressly excepted in all previous provisions. Accessaries before the fact, as they were not named, so neither were they affected till 4 & 5 P. & M. placed them on a footing with principals. The judgment against men has always been that they be drawn to the place of execution, and there hanged; and women, who were formerly burned, as in other kinds of treason, now receive the same sentence; 32 Geo. 2. c. 48. The additional severities introduced by 25 Geo. 2. c. 37. for the punishment of murder, have been holden to apply also to petit treason, and therefore in every case they now form a part of the sentence; Fost. 10.

**Treating Act.** See *ante*, tit. *Bribery; Elections*.

**Treble Costs.** See *ante*, tit. *Costs*.

**Trees.\*** See also 7 & 8 Geo. 4. c. 29. s. 3; and *ante*, vol. xii. p. 74. n.

**Trespass.**

[ 118 ]

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II. ——— WHEN, AND BY WHOM MAINTAINABLE.

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(B) TO THE PERSON, p. 120.

(C) FOR INJURIES TO PERSONAL PROPERTY.

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(D) FOR INJURIES TO REAL PROPERTY.

(a) When it lies, p. 124. (b) By whom, p. 126.

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VI. ——— THE ACTION FOR.

(A) DECLARATION.

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(B) PLEAS.

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1st. Accord and satisfaction, p. 137. 2nd. Release, p. 137. 3rd. Licence, p. 138. 4th. Judgment recovered, p. 139. 5th. Tender of amends, p. 139. 6th. Limitation, statute of p. 140.

(c) As connected with the person, p. 140. (d) As connected with personal property, p. 140. (e) As connected with real property.

1st. In general, p. 141. 2nd. *Liberum tenementum*, p. 142. 3rd. Right of way, p. 142.

(C) NEW ASSIGNMENT, p. 142.

(D) REPLICATIONS.

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\* A landlord has, in legal consideration, the possession of timber, though not excepted in the lease, so that, though it be cut down pending the term, if it be carried away, he may maintain trespass or trover, the interest of the lessee in the trees determining instantly they are cut down; 7 T. R. 13; 2 M. & S. 499, 500; 1 Saund. 322, u. 5; Vin. Ab. Tresp. 8. Pl. 10. When trees are excepted in a lease, the lessee has no interest therein, and cannot sue even a stranger for cutting them down, though he might for the trespass to the land; and in such case the lessor may support trespass against the lessee or a stranger, if he either sell or damage them; but if there be no exception of the trees in the lease, the lessee has a particular interest therein, and may support trespass against the lessor or a stranger for an injury to them during the term; but the interest in the body of the trees remains in the lessor, as part of his inheritance, and he may support an action on the case against a lessee or a stranger for an injury thereto, or even trover if they be cut down and carried away; 1 Saund. 322, n. 5; 7 T. R. 13; 1 Taunt. 190, 191, 194; 2 M. & S. 498, 499.

Although no action in *forin ex delicto* can in general be supported against the personal representative of the wrong-doer, 7 T. R. 732; 1 Saund. 216. n. 1; 2 Saund. 252. n. 7; 3 T. R. 549; yet if trees, &c. be taken away, and sold by the testator, assumpsit for money had and received lies against his executor, 3 T. R. 549; Cowp. 373, 374; or trover, if they remain in specie, and the executor refuse to restore them, Cowp. 373, 374; 7 T. R. 13; 1 Saund. 216. a; and a court of equity will frequently afford relief against the executor of the wrong-doer, though at law the action *moritur cum persona*, 3 Atk. 757; 2 Ves. 520; 2 Vent. 360; 3 T. R. 549; and, therefore, where the tenant for life cut down timber and died, relief was decreed against his executors in favour of the remainder-man; 7 T. R. 732.

- (a) De injuria, p. 144. (b) To plea of liberum tenementum, p. 145.  
 (c) To plea of licence, p. 145. (d) To plea of right of way, p. 145.

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(G) EVIDENCE.

- (a) As to the person, p. 146. (b) As to personal property, p. 147. (c) As to real property, p. 147.

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(I) COSTS, p. 148.

## VII. RELATIVE TO THE INDICTMENT, AND INFORMATION FOR. See *ante*, tits. Assault and Battery; Indictment; Information.

### I. RELATIVE TO THE DEFINITION OF.\*

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### II. RELATIVE TO WHEN AND BY WHOM MAINTAINABLE.

#### (A) IN GENERAL.

OXLEY v. WATTS. M. T. 1785. K. B. 1 T. R. 12.

By abusing  
an authority  
in law the  
party be-  
comes a  
trespasser  
ab initio;  
hence, tho'  
an animal  
be properly  
seized as  
an estray,  
the work-  
ing it after-  
wards is il-  
legal.  
Trespass  
lies for an  
unlawful  
taking, as  
for fishing  
in libera  
piscaria and  
taking the  
fish.†

Trespass for a horse. The defendant, as bailiff of Lord Dartmouth, lord of the manor of A., justified taking the said horse as an estray. Replication, that after the taking mentioned in the declaration the defendant worked the said horse, and so became a trespasser *ab initio*. Motion to set aside the verdict which had been obtained by the plaintiff, on the ground that this should have been an action on the case for the consequential damage, and not an action of trespass, because the original taking was admitted to be lawful.

*Per Cur.* The subsequent usage is an aggravation of the trespass in taking the horse; for the using made him a trespasser *ab initio*.

Vide Taylor v. Cole, 3 T. R. 292.

(B) TO THE PERSON. See *ante*. tit. Assault and Battery.

(C) FOR INJURIES TO PERSONAL PROPERTY.

#### (a) When it lies.

1. SMITH v. KEMP. M. T. 1688. K. B. Salk. 637.

The Court thought an unlawful taking might be redressed by an action of trespass, as for fishing in *libera piscaria*, and taking the fish.

\* In legal consideration the word "trespass" in its most extensive and unlimited sense, signifies any transgression against, or dereliction from, the law of nature, of society, or of the kingdom, whether it be in reference to a man's person or to his property; and in strictness of law is only maintainable for injuries committed either with actual or implied force, and is in general confined to the redress of such as are immediate. The nature and peculiar distinction between consequential and immediate injuries have been shown under tit. Action. It will therefore suffice to refer to that head.

† Trespass is a general and concurrent remedy with trover for most illegal takings, 3 Wils. 336; as if a sheriff or stranger illegally take the goods of another in execution, and sell and deliver them to a third person; or it will lie for illegally distraining when no rent was due; or taking implements of trade or beasts of husbandry, when there was sufficiency of other property; but it is not sustainable against a joint tenant, tenant in common, or partner, for merely taking away and holding exclusively the property from his co-tenant, because each has an interest in the whole, and a reciprocal right or power of disposing of the chattel; Co. Litt. 200; Cowp. 436. So, if a ship is seized for a forfeiture under the navigation act, it is no trespass, though not brought to judicial condemnation; Roberts v. Wetherall, Salk. 228. n. It lies not for taking beasts in one county, and impounding them in another, but an action on the statute; Woodroft v. Thompson, 3 Lev. 48. Trespass for taking money is bad, if it appear either on the evidence or the pleadings on the part of the plaintiff to have been a felonious taking, unless the offender has been prosecuted for the crime; Lutterel v. Reynell, 1 Mod. 283. But it may be maintained for an injury committed to personal property, whilst in the lawful adverse possession of the wrong doer, as where he has been guilty of a subsequent abuse, which renders him a trespasser *ab initio*, Bac. Abr. Trespass; although the original taking be admitted to be lawful, as for working an estray, 1 T. R. 12; or a horse or other animal distrained; or if a distress for rent be unlawfully made, as at night; or if doors have been broken open, Co. Litt. 181. except in conformity with the directions of statute 11 Geo. 2. c. 19. which empowers the party distraining to break open the door in presence of a constable or peace officer, if he suspects that the good-intended to be distrained have been conveyed away, and fraudulently conceal-

2. *STOREY v. ROBINSON*. H. T. 1795. K. B. 6 T. R. 138. S. P. REYNOLDS [ 121 ]  
v. OSBORN. M. T. 1694. 5 Mod. 575.

This was an action of trespass for an assault and false imprisonment, and for seizing and leading away the defendant's horse upon which he was riding. Lord Kenyon, C. J. This distress cannot be supported; all the authorities upon this point are collected altogether in the notes in Hargr. Co. Litt. 47; and the clear result of them is, that such distress is illegal. If it were permitted to a party to distrain a horse while any person is riding him, it would perpetually lead to a breach of the peace.

3. *BASLEY v. CLARKSON*. M. T. 1693. K. B. 3 Lev. 37.

In an action of trespass, the Court held it sustainable, though there had been no wrongful intent.

4. *MARLOW v. WEEKES*. M. T. 1743. C. P. Barnes, 452. *DAND v. SEXTON*. H. T. 1789. K. B. 3 T. R. 37.

After a verdict for plaintiff, defendant moved in arrest of judgment, objecting, that an action of assault and battery is not applicable to a dead thing, or a brute beast, but to one of the human species only. The objection was overruled; the Court saying, an assault upon a ship (a dead thing) is bad; but for an injury to a beast, a writ in trespass *vi et armis* appears in a register.

5. *OXLEY v. WATTS*. M. T. 1785. K. B. 1 T. R. 12.

This was an action of trespass for distraining a chattel whilst in possession and use of the owner. The Court held it sustainable for any unlawful act committed by the wrong-doer whilst possessed of such chattel.

(b) *By whom.*

ed in such a house. And if an account be stated between A. and B., by which it appears that A. is indebted to B. in such a sum, and A. signs the account, and afterwards by false and sinister insinuations gets it into his hands and tears it, he is a trespasser; *Rex v. Crisp*, 6 Mod. 155.

\* Or, if a distress be made the outer door being shut; or if the party expel the tenant or continue in possession without leave more than five days, trespass lies, 1 East, 139; 11 East, 335; 2 Camb. 115; for the stat. 11 Geo. 2. c. 19. which enacts, that a party distraining for rent shall not be a trespasser ab initio, 1 Hen. Bla. 13. only relates to irregularities after a lawful taking; 1 Esp. N. Pri. 382, 383.

† As if a sheriff or a messenger on behalf of assignees of a bankrupt take, by mistake, the goods of a wrong person; 2 Campb. 576; Bro. Ab. Propertie, 23. except in the case of a levy under an execution, after a secret act of bankruptcy, when trover only can be supported; 1 T. R. 480. This action may be supported against a bailee who has only a bare authority, as if a servant take goods of his master out of his shop and convert them; so it is sustainable by an outgoing tenant against the incoming tenant, for taking manure, though the latter had a right to it on paying for it; but in general trespass is not sustainable against a bailee who has the possession coupled with an interest, unless he destroy the chattel; but if the thing be destroyed, trespass lies, Co. Lit. 200. a.; and case may be supported for injuring the thing; 8 T. R. 145; Ld. Raym. 737. A bailee of a chattel for a certain time, coupled with an interest may support this action against the bailor for taking it away before the time, Godbolt, 178. F. N. B. 86. n. a.; and it lies, though after the illegal taking the goods be restored; Bro. Ab. Tres. Pl. 221; 2 R. Ab. 569. Pl. 3. 6.

‡ As for chasing sheep, &c., or for mixing water with wine, F. N. B. 88; or unintentionally running down a ship or a carriage. But it is said that for a mere battery of a horse, not accompanied with special damage, no action can be supported; 2 Stra. 8. 72; *quare*, Barnes, 452. It is said that if a bailee of a beast, &c. kill it, trespass cannot be supported but only, case, because a general confidence has been reposed in him; Bac. Abr. Trespass. G. 1.; Moore, 248; but it appears to be erroneous, for though the act may not render the party a trespasser ab initio, yet he may be considered as a trespasser for the wrongful act itself; Co. Lit. 57. a.; Cro. Eliz. 777. 784; 5 Co. 12. b.; Bro. Tresp. Pl. 295; Leon. 87; 11 Cro. 82. a.; so case Co. Lit. 57. a. n. 4. or assumpsit for a breach of the implied contract may be supported; and it seems clear that if a person be bailee, though coupled with a beneficial interest, as of sheep to feed his land, or of oxen to plough it, Co. Lit. 57, 58; Cro. Eliz. 784; and he kill or destroy them, trespass lies, because his interest therein is thereby determined, the same as when a tenant at will cuts down trees; 7 T. R. 11; Co. Lit. 57. a.; Cro. Eliz. 784; 5 Co. 13. b.; Co. 82. a.; Dyer, 121. b. pl. 17.

§ This obtains, in general, whenever the person who first acted with propriety under an authority, or licence given by law, afterwards abuses it, in which case the taking, as well as the real tortious act, may be stated to be illegal, as in the *Six Carpenters' case*. 8. Co. 146. b.; or for cutting nets, lawfully taken damage feasant, Cro. Car. 226.

1. **SMITH v. MILLS.** M. T. 1786. K. B. 1 T. R. 475. S. P. **WALTER v. RUMBALL.** H. T. 1695. K. B. 4 Mod. 392.

To support trespass to personal property the party must have possession either in fact or in law.\*

**Per Ashhurst, J.** To entitle a man to bring trespass, he must, at the time when the act was done which constitutes the trespass either have the actual possession, *vide* **Ward v. Maccauley**, 4 T. R. 489. in him of the thing, which is the object of the trespass, or else he must have a constructive possession in respect of the right being actually vested in him; such is the case of an action of trespass for an estray, or wreck, taken by a stranger before seizure by the lord, for the right is in the lord, and a constructive possession in respect of the thing being within the manor of which he is lord. So, the executor has a right immediately on the death of the testator, and the right draws after it a constructive possession. The probate is a mere ceremony; but, when passed, the executor does not derive his title under the probate, but under the will; the probate is only evidence of his right, and is necessary to enable him to sue; but he may release, &c. before probate. But there is no instance that I know of where a man, who has a new right given him, which, from reasons of policy, is so far made to relate back as to avoid all mesne incumbrances, shall be taken to have such a possession as to bring trespass for an act done before such right was given to him.

2. **FOWLER v. DOWN.** E. T. 1797. C. P. 1 B. & P. 45.

In this case the question was, whether a mere bailee had a sufficient possession to sustain an action of trespass. The Court held that he had.

3. **WILLIAMS v. SANDERS.** M. T. 1798. K. B. 8 T. R. 72. **GORDON v. HARPER.** H. T. 1796. K. B. 7 T. R. 12.

**Per Lord Kenyon, C. J.** To support trespass, the actual right to possession is sufficient, without having actually had possession.

[ 123 ]  
And that rule has been extended to a bailee.† But it is not essential that he should ever have had possession.‡

\* It being an established principal of the law, that the general property in personal chattels prima facie draws to it the possession, 2 Bulst. 268; 1 T. R. 480; as if a man gives A. his goods, which are at York, and before A. has acquired possession a stranger takes them, yet A. may maintain trespass, because the law annexes possession to it; **Bro. Abr. Trespass**, 303. And trespass will lie for a master of a ship for goods taken away, shipped on board, and he must declare on his possession; **Mikes, v. Calley**, 12 Mod. 383. If a vendor sells goods by sample, to be delivered to the vendee within a month, and take earnest, and within a month send them by his servant to the premises, and when part are unloaded the rest are distrained for toll, the delivery is complete, so as to entitle the vendee to bring trespass for the seizure; **Blakely v. Dimsdale**, 6 Mo. 162. n. It lies by a sheriff to recover goods seized by him in execution; **Williams v. Groyn**, 2 Saund. 46. c. 47; **Tyrril v. Bash**, Cro. Eliz. 639; **Wilbraham v. Snow**, 1 Mod. 30. If A. defraud B. of goods, and sell them to C. and B., after notice that C. claims property therein, replevy them, C. may bring trespass for the taking; **Leonard v. Stacy**, 6 Mod. 69. So one that has free warren may have trespass against any but the owner of the soil for hunting there; **Smith v. Kemp**, Salk. 637. In trespass for fishing in his free fishery, the jury find specially that the place where &c. is parcel of the manor of D., and that the plaintiff is seized of this manor in fee, and conclude that they find for the plaintiff, if he could have an action of trespass for fishing in his fishery within his own land; and adjudged that the plaintiff may have such a fishery; for though divers may have liberty to fish there beside himself, this is *libera piscaria* in his manor; **Gipps v. Wolcott**, Skin. 677. Lessee at will may bring an action of trespass in his own name; **Geary v. Bearcroft**, Carter. 66.

† A bailee, &c. with a mere naked authority, coupled only with an interest as to remuneration; he may also support this action for any injury done while he was in actual possession of the thing; as a carrier, factor, pawnee, a sheriff, &c.; but it is otherwise in the case of a mere servant; **Owen**, 52; 3 Inst. 103; 2 Bla. Com. 396; 2 Saund. 47. b. c. d. Hence, in case of a factor or consignee of goods, in which he has interest in respect of his commission, &c.; 7 T. R. 359; 1 T. R. 113; 1 Hen. Bla. 81; Rol. N. P. 33. The quantity or certainty of the interest is not material, and therefore a shopkeeper may maintain trespass for taking goods sent to him on sale to return; 2 Campb. 491; 2 M. & S. 499; So, a tenant for years has a qualified property in trees whilst growing, and may support trespass for cutting them down unless they are excepted in the lease though he cannot support this action merely for carrying the trees away; 2 Campb. 491; 2 M. & S. 499; and if a person have a right to cut all the thorns in such a place, he may sustain trespass against any one who cuts them down, even against the grantor; but if he have only estovers, and the grantor cuts the whole, the remedy is case and not trespass; 2 Salk. 638; 2 M. & S. 499.

‡ And this rule holds by relation, as in case of executors and administrators, &c. who may support trespass for an injury to personal property committed after the death of the testator or intestate, and before probate or administration; 1 T. R. 480; **Bac. Ab. Executors**; H. 1; 2 Saund. 47 K.; so may a legatee, after the executor has assented to the legacy;

## 4. CHURCHWARD V. STUDDY. T. T. 1811. K. B. 14 East, 249.

In trespass for taking and carrying away a dead hare, it appeared in evidence that the plaintiff, a farmer, being out hunting with hounds of which he had in part management, and actually had such management at the time, though the hounds belonged to other persons, the hounds put up a hare in a third person's ground, and followed her into a field of the defendant, where, being quite spent, she run between the legs of a labourer who was accidentally there, where one of the dogs caught her, and she was taken up alive by the labourer, from whom the defendant immediately afterwards took the hare and killed her. Shortly after the plaintiff came up and claimed to have the hare as his own, but the defendant refused to give it up, and questioned the right of the plaintiff to be where he then was. The labourer swore that when he took the hare from the dogs, he did not mean to take it for his own use, but in aid of the hunters. The case of *Sutton v. Moody*, 1 *Ld. Raym.* 250, and 2 *Salk.* 556. was referred to, where it was said by Holt, C. J., that "if A. start a hare in the ground of B. and hunt and kill it there, the property continues all the while in B.; but if A. start a hare in the ground of B. and hunt it into the ground of C. and kill it there, the property is in A., the hunter, but A. is liable to an action of trespass for hunting in the grounds as well of B. as of C." And Chambre, J., thought that this evidence sufficiently established the plaintiff's property in the hare; and the jury found a verdict for the plaintiff, with 40s. damages. The Court of King's Bench afterwards concurred in his opinion: Lord Ellenborough, C. J., observing, "that he did not understand, at the time when the rule was granted, that the plaintiff through the agency of his dogs had reduced the hare into his possession; that makes an end of the question even though the labourer had first taken hold of it before it was actually caught by the plaintiff's dogs; yet it now appears that he took it for the benefit of the hunters, as an associate of them, which is the same as if it had been taken by one of the dogs. If, indeed, he had taken it up for the defendant, before it was caught by the dogs, that would have been different; or even if he had taken it as an indifferent person in the nature of a stakeholder."

So, actual possession [ 124 ] without the consent of the owner is sufficient to support this action. Therefore if A. start a hare in the grounds of B., hunt it into those of C., and there take it, the property is in A. who may maintain trespass.

## (D) FOR INJURIES TO REAL PROPERTY.

## (a) When it lies.

## 1. CROSBY V. WADSWORTH. T. T. 1805. K. B. 6 East, 602.

The plaintiff, on the 6th of June, 1804, agreed with the defendant for the purchase of a standing crop of mowing grass, then growing in a close of defendant's. The grass was to be mowed and made into hay by the plaintiff; for a trespass committed before such assent: *Bro. Ab. Trespass*, Pl. 25. But if the general owner part with his possession and the bailee at the time when the injury was committed have a right exclusively to use the thing the inference of possession is rebutted, and the right of possession being in reversion, the general owner cannot support trespass, but only an action on the case for an injury done by a stranger while the bailee's right continued; 4 *T. R.* 489; 7 *T. R.* 9; 3 *Lev.* 209; 3 *Campb.* 187.

\* And even a person having an illegal possession may support this action against any person but the legal owner, 1 *East*, 244; *Cro. Eliz.* 819; 5 *Co.* 24; *Moore*, 691, 692; 3 *Wils.* 332; 2 *Str.* 777; 1 *Salk.* 290; 2 *Saund.* 47. c.; and a person in possession under an assignment fraudulent as against creditors may support trespass against a person who cannot show that he was justified in what he did as a creditor; 2 *Marsh.* 233.

† For every unjustifiable entry into the land of another is a trespass, for every man's land is, in the eye of the law, inclosed and set apart from his neighbour's either by a hedge or by an ideal and invisible boundary, existing only in the contemplation of law; as where one man's land adjoins to another in the same field; and every such entry, or breach of a man's close, carries necessarily along with it some resulting damage or injury to the owner or occupier; 3 *Blac. Com.* 210. With reference to the nature of the property injured or affected, it must in general be something tangible and fixed, as a house, building, or lands, and the act of trespass is complete by the wrongful entry into a messuage or tenement of another, although the defendant does not continue in possession, for trespass lies *quare domum vel clausum fregit*: *F. N. B.* 87. This action may also be maintained for an injury to the plaintiff's land covered with water; but if the interest be merely in the water case is the only remedy; *Yelv.* 143; and if the injury be done to the plaintiff's river, pond, &c. it must be described as the plaintiff's close or land covered with waters *ibid.* It has been adjudged, in many instances, that however temporary the plaintiff's interest may be, and although it is only in the profits of the soil, trespass *quare clausum*

Trespass lies for an injury to real property, however temporary the plaintiff's interest may be.†

[ 125 ] but the time at which the mowing was to begin was not fixed: possession of the close was retained by the defendant. Before the plaintiff had done any act towards carrying the agreement into effect, defendant sold the grass to another person, whom he directed to cut and carry away the same. Trespass *quare clausum fregit* was brought, stating in the declaration that the close was in possession of the plaintiff. Lord Ellenborough, C. J., said, that as the plaintiff appeared to have been entitled (if entitled at all under the agreement stated) to the exclusive enjoyment of the crop growing on the land during the proper period of its full growth, and until it was cut and carried away, he might, in respect of such exclusive right, maintain trespass against any person doing the acts complained of, according to the authority of 1 Inst. 4. 6; Fitz. Abr. Tres. 149; Bro. Abr. Tres. 273; and *Wilson v. Mackreth*, 3 Burr. 1826. But the Court were of opinion, that, as the agreement was by parol, it was competently discharged by parol while it remained executory, and that on this ground the plaintiff was not entitled to recover.

[ 126 ] 2. *BASELY v. CLARKSON*. M. T. 1680. K. B. 3 Lev. 57. *POWEL v. LAM- ING*. M. T. 1808. K. B. 1 Campb. 497.

And though the trespass was committed unintentionally.\* Trespass for breaking plaintiff's close called the balk. Plea, that the defendant has a balk adjoining to the balk and hade of the plaintiff, and involuntarily and by mistake committed, &c. The plaintiff demurred, and had judgment; for it appears the fact was voluntary, and his intention and knowledge are not traversable; they cannot be known.

3. *DOULSEN v. MATTHEWS*. H. T. 1792. K. B. 4 T. R. 503. S. P. *REX v. HOOKER*. H. T. 1733. K. B. 7 Mod. 193.

Trespass was brought for entering the plaintiff's house at Canada. It was holden that the action could not be maintained, Buller, J. observing, "It is now too late for us to inquire whether it was wise or politic to make a distinction between transitory and local actions; it is sufficient for the Courts, that the law has settled the distinction, and that an action *quare clausum fregit* is local; we may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local."

(b) *By whom.*

1. *GRAHAM v. PEAT*. H. T. 1801. K. B. 1 East, 244. *CATTERIS v. COWPER*. T. T. 1812. C. P. 4 Taunt. 547. S. P. *WALKER v. RUMBALL*. H. T. 1693. K. B. 4 Mod. 392.

Bare possession is sufficient to Trespass, *quare clausum fregit*. Plea, the general issue (and certain special pleas not material to the question). At the trial before Graham, B., the trespass *fregit* may be maintained; 5 East, 490; Moor, 802, 5 T. R. 535. If a lease be made, with exception of the trees, and a power reserved to the lessor to enter and cut them down, he may assign this power; but if it be not properly pursued, the lessee may maintain trespass both against the lessor and his assignee; *Warren v. Arthur*, 2 Mod. 317. Causing the plaintiff's fishery to be overflowed by putting down the defendant's own wear, is a trespass, and may be joined in another trespass; *Courtney v. Collet*, 1 Ld. Raym. 274. It lies for erecting a stall in a market without agreeing for the stalls; the *Mayer of Northampton v. Ward*, Stra. 1238. So, in setting the end of a bridge on the plaintiff's soil, though a highway; *Lude v. Shepherd*, Stra. 1004. When an entry, authority, or licence is given to any one, either by the common or statute law, and he does not pursue it, or abuses it, he shall be a trespasser *ab initio*, but not where the entry, authority, or licence is given by the party; *Six Carpenters' case*, 8 Cor. 146. a.; 4 Mod. 891. If a man cut and carry away corn at the same time, it is trespass, and not felony; *Emmerson v. Annison*, 1 Mod. 89. 90. But where one who has a right to enter into his neighbour's yard, lawfully fixes a spout there, which does damage, not by the mere act itself, but by the consequence of it, trespass does not lie, but case; *Reynolds v. Clarke*, 2 Ld. Raym. 1399; 8 Mod. 272; Fort. 212; 1 Stra. 634. S. C. But where the original act was a wrong in itself, there trespass *vi et armis* lies; S. C. 8 Mod. 275. It does not lie for him who takes only the profits out of another's land, but an action on the case; 2 And. 7. Barking of trees by the lessee's cattle, when the trees are excepted, is no trespass; *Glenham v. Hanby*, 1 Ld. Raym. 739.

\* And though the *locus in quo* were inclosed, Doe and Stud. 20; 7 East, 207; or the door of the house were open, if the entry were not for a justifiable purpose; Bac. Ab. Trespass, F.; 2 Roll. Ab. 555. 1. 16. and even shooting at and killing game on another's land, though without an actual entry, is in law an entry; 11 Mod. 74. 130; 1 Stark. 58; though in general when the injury is committed off the plaintiff's land, or by causing something to be suspended over it, but not touching it, the remedy must be case; 2 Burr, 1114;



pass was proved in fact; but it also appeared that the *locus in quo* was part of the glebe of the rector of the parish of Workington in Cumberland, which had been demised by the rector to the plaintiff, and that the rector had not been resident within the parish for five years last past, and no sufficient excuse was shown for his absence; whereupon it was objected that the action could not be maintained, the lease being absolutely void by the act of the 13 Eliz. c. 20. which enacts "that no lease of any benefice or ecclesiastical promotion with cure or any part thereof, shall endure any longer than while the lessor shall be ordinarily resident, and serving the cure of such benefice, without absence above fourscore days in any one year, but that every such lease immediately upon such absence shall cease and be void." And thereupon the plaintiff was nonsuited. Lord Kenyon, C. J. There is no doubt but that the plaintiff's possession in this case was sufficient to maintain trespass against a wrong-doer; and if he could not maintain an ejectment upon such a demise, it is because that is a fictitious remedy founded upon title. Any possession is a legal possession against a wrong-doer; suppose a burglary committed in the dwelling-house of such an one, must it not be laid to be his dwelling-house, notwithstanding the defect to his title under the statute?

2. *CARY v. HOLT*. M. T. 1745. K. B. Stra. 1238; S. C. 11 East, 70. n.

The plaintiff declared in trespass upon his possession. Defendant made title, and gave colour to the plaintiff; plaintiff replied *de injuria sua propria*, and traversed the title set out by defendant; and upon demurrer, on the authority of *Goslin v. Williams*, 5 Geo. 1, the Court held this to be a good replication; for it lays the defendant's title out of the case, and then it stands upon 11 Mod. 74. 130; Stark. 59; and a mere nonfeasance, as leaving tithe on land, is not sufficient to support trespass.

Against a wrong-doer.†

\* A landlord cannot during a subsisting lease support trespass; but this form of action, if resorted to, must be in the name of the tenant or actual occupier; for under those circumstances the landlord must proceed in case, unless the injury was committed to trees or other property excepted in the lease, when the latter may support trespass *quare clausum fregit*; though in no instance is a party competent to maintain an action of trespass (except as above mentioned) before entry and actual possession, notwithstanding he has the freehold in law, as an heir or devisee against an abator, but a disseisin, in which time the plaintiff was seised of the land; but he cannot have it for any act committed after the disseisin, until he has acquired possession by re-entry, and then he may well maintain it for the intermediate damage done; for, after his re-entry, the law, by a kind of *jus postliminii*, supposes the freehold all along to have continued in him; 3 Bl. Com. 210. Every unjustifiable entry into the land of another is a trespass; for every man's land is, in the eye of the law, inclosed and set apart from his neighbour's, land that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary existing only in the contemplation of the law, as where one man's land adjoins to another in the same field. And every such entry or breach of a man's close carries necessarily along with it some resulting damage or injury to the owner or occupier; 8 Bla. Com. 210. With reference to the nature of the property injured or affected, it must in general be something tangible and fixed, as a house, building, or land; and the act of trespass is complete by the wrongful entry into a messuage or tenement of another, although the defendant does not continue in possession, for *quare domum vel clausum fregit*; F. N. B. 97. This action may also be maintained for an injury to the plaintiff's land covered with water; but if the interest be merely in the water, case is the only remedy; Yelv. 143; and if the injury be done to the plaintiff's close or land covered with water; *ibid*. It has been adjudged in many instances that however temporary the plaintiff's interest may be, and although it is only in the profits of the soil, trespass *quare clausum fregit* may be maintained; 5 East, 480; Moore, 302; 5 T. R. 535.

† It therefore follows, that a tenant for years, 2 Rol. Ab. 551; Sid. 347; a lessee at will, *Id. ibid.*, may support this action against a stranger, or even against his landlord, unless a right of entry be expressly or impliedly reserved; 11 Mod. 209; Com. Dig. Bians. H. 11; Co. 43. There is a material distinction between personal and real property, as to the right of the owner; in the first case we have seen that the personal property draws to it the possession, sufficient to enable the owner to support trespass, though he has never been in possession; 2 Saund. 47. a.; Bul. N. P. 33. But in the case of land and other real property, there is no such constructive possession; and unless the plaintiff had the actual possession by himself or his servant; 16 East, 33. at the time when the injury was, he cannot support his action; 5 East, 485. 487; Bac. Ab. Trespass, c. 3. Thus, before entry and actual possession, a person cannot maintain trespass, though he has the freehold in law, as a person before induction; Vin. Ab. Entry, G. 4. and Trespass, T.; Bac. Ab. Leases, M. Plewd. 528.

[ 128 ] the plaintiff's possession, which is enough against a wrong-doer, and the plaintiff need not reply a title.

So, trespass may be maintained by a person who has dedicated property to the public, if it afterwards reverts to him.

But trespass will not lie by a landlord of a furnished house against the sheriff who has seized his property under an execution against the tenant.\*

Trespass lies against A. for the act of B., if A. request B. to commit a trespass which B. does, A. is the trespasser.†

3. HARRISON v. PARKER. H. T. 1805. K. B. 6 East, 154.

The owner of a piece of land granted liberty to A. and his heirs to build a bridge on his land, and A. covenanted to build a bridge for public use, to keep it in repair, and not to demand toll. The bridge was built by A., the materials of the bridge having been taken away by a wrong-doer; it was holden that the public had only a licence to make use of the materials while they formed part of the bridge for the purpose of passage, and when they ceased to be part of the bridge, A.'s original property in them reverted to him, discharged of the right of user by the public, and consequently that A. might maintain trespass for the *asportavit* against the wrong-doer.

4. WARD v. MACAULY. M. T. 1791. K. B. 4 T. R. 489.

The plaintiff was landlord of a house, which he let to A. ready furnished, and the lease contained a schedule of the furniture. An execution issued against A. under which defendant as sheriff seized part of the furniture, although notice was given to the officer that it was the property of the plaintiff. Plaintiff brought trespass. Adjudged,

*Per Cur.* That it would not lie.

### III. RELATIVE TO AGAINST WHOM MAINTAINABLE.

1. BRITTON v. COLE. T. T. 1696. K. B. Comb. 434.

Trespass for taking forty-two sheep and two lambs; the defendant justifies by virtue of a writ of *levari facias*, upon an outlawry directed to the sheriff, who, thereupon, made his warrant to Anthony Powel and Joseph Powel, and because the said forty-two sheep and two lambs were then upon the lands, &c. levant and couchant, *requisivit* Anthony Powel and Joseph Powel to take them *ad fendum de redditu exit et profic. super quo præd.* John Powel and Joseph Powel took them, &c.; the plaintiff demurs.

The point in law is whether the cattle of a stranger may be taken and sold

\* So, trespass will not lie by the assignees of a bankrupt against a sheriff, Smith v. Milles, 1 T. R. 475, for taking the goods of a bankrupt in execution, after an act of bankruptcy, and before the issuing of the commission, notwithstanding he sells them after the issuing of the commission, and after a provisional assignment, and notice from the provisional assignees not to sell.

† Trespass lies against a mere tenant at will for pulling down a house, or cutting trees during the tenancy at will, the interest being thereby determined; Cro. Eliz. 784, 785; Co. 13. b.; 11 Co. 81, b. 82, a.; Co. Lit. 57. a.; Saville, 84; but against a lessee for years trespass for cutting down trees does not lie: and case in the nature of waste is the only remedy for cutting, unless the trees were excepted in the lease; Aleyn. 83; 1 Saund. 322. n. 5; 4 Taunt. 316; though, if he afterwards take the trees away, trespass or trover lies; Cro. Eliz. 784, 785; Cro. 13 b.; 11 Co. 81. b. 82. a.; Co. Lit. 57. a.; Saville, 84; and if the trees be excepted in the lease, and he cut them down, trespass *quare clausum fregit* lies for such cutting; Bro. Trespas, Pl. 55; 1 Saund. 322. n. 5; Bac. Ab. Tresp. c. 8. The proper remedy by one joint tenant, or tenant common, against the other, who commits waste to the land or other property, as by cutting down trees unfit to be cut down, is an action on the case for nuisance, 8 T. R. 145; Com. Dig. Estate, K. 8; but if one tenant in common disturb the other in possession, trespass *quare clausum fregit* may be supported; as if two be tenants in common of a folding, and one of them by force prevent the other from erecting hurdles, &c.; Co. Lit. 200. b.; and though trespass does not lie against a tenant in common for taking the whole profits, yet if he drive out of the land any of the cattle of the other tenant in common, or hinder him from entering or occupying the land, an action of trespass *quare clausum fregit*, or an ejectment, may be supported; Co. Lit. 199. b.; 3 Wils. 119; 12 Mod. 537. An action lies as well against A. as against B., 1 Campb. 187; 2 Bla. Rep. 1055; 5ilk. 409; 4 Inst. 317; Bac. Ab. Trespas, G.; Com. Dig. tit. Trespas, c. 1; if A. direct B., the sheriff, to levy particular goods not the property of the defendant in the action; 2 Rol. 553. l. 5. 10. It may also be supported against a person not being an infant or feme covert, who afterwards assents to a trespass committed for his use or benefit, Cowp. 478; 3 Wils. 377; though not so as to subject him for a forcible entry; 4 Inst. 317; Co. Lit. 180, b. n. 4. So, for taking goods even to subject the party assenting for an abuse of an authority in law, as a trespasser ab initio. But without such consent trespass does not in general lie; as if A. command his servant to do a lawful act, as to distrain the goods of B. and he wrongfully take the goods of C., A. is not liable, 3 Wils. 312, 317; 1 East, 108; the liability of a sheriff being an exception, and the mere acceptance of goods illegally taken by another does not always furnish evidence of an

by the sheriff upon a *levari facias*; but counsel for the plaintiff took several exceptions to the plea: 1st. That the defendant here pleads only the writ of *levari*, and the execution thereof, which is indeed sufficient to justify the officer, but a stranger who commands the bailiff to do execution ought to set forth the outlawry, &c. Here is a request to Anthony and Joseph (to whom the warrant is directed), *super quo* John and Joseph took them, whereas John was named before, so that here is no trespass confessed, as there ought to be before it can be justified. To the first, Holt, C. J., said, there seems to be a difference between one that comes under the officer, and one that sets the officer on work; as, if there be no judgment, the officer is safe, but not the plaintiff who sets him to work; if judgment be set aside for irregularity, the officer is safe, but not the plaintiff, who intermeddles; for which he cited the case of Felgate, anno 1655. (2 Sid. 125. S. C.) If there be judgment against one that is no terre-tenant, the demandant that recovered is a disseisor, but not the sheriff; so perhaps here you should not only show that there was a process, but also that there was an outlawry; if there be judgment against a casual ejector and execution thereupon, it is a good warrant to the sheriff; yet if the plaintiff enters, trespass lies against him if he has really no title.

2. SANDS v. CHILD. E. T. 1692. C. P. 3 Lev. 352.

*Per Cur.* A servant may be sued for a tort done by the master's command.

But it lies against either.

#### IV. RELATIVE TO WHEN SEVERAL ACTIONS ARE MAINTAINABLE.

1. AIKINHEAD v. BLADES. M. T. 1814. C. P. 1 Marsh, 17; S. C. 5 Taunt. 198.

The first count of the declaration stated, that the defendants, on the 26th of April, 1813, and on divers other days and times between that day and the commencement of this suit, broke and entered the plaintiff's dwelling-house, &c., and on the day first mentioned seized and took the plaintiff's goods, and converted them, &c. The second count stated that the defendants, on the day and year first above mentioned, broke and entered the plaintiff's dwelling house and continued therein for a long space of time, to wit, from thence until the commencement of this suit. The third count was for a common *asportavit*. Pleas, 1st. Not guilty; 2ndly. That the trespasses in the three counts mentioned were the same act, and not different trespasses; and to this a justification under a writ of *testatum fieri facias*. The point in question was that contained in the second plea, viz. whether the trespasses in the three counts

The entry by a sheriff under a *fieri facias* sale of goods and keeping possession till after the return of the writ is one trespass only.

assent, 2 Rol. 555. l. 50; as if a pound-keeper receive goods illegally distrained; Cowp. 476. But in these cases, if the party after demand withhold the goods, trover may be supported against him.

Trespass lies against a sheriff, or those who act in his aid, for granting a replevin after notice of a claim of property; Leonard v. Stacey, 6 Mod. 140. Where a justice of peace commits one as a reputed father of a bastard, which after appears to be no bastard, an action of trespass and imprisonment lies against the justice; Dr. Groinvel's case, Comb. 482. An officer of customs is liable in trespass for a wrong seizure, notwithstanding probable cause; Leglise v. Champante, Str. 820. If bailiffs break open doors to execute process, the party injured may have an action of trespass against them; but the Court will not grant an attachment against them, unless it appear to have been an abuse of the process of the law; Anon. 6 Mod. 105. But trespass will not lie against the lessee who holds over his term, without an actual entry; Trevillian v. Andrew, 5 Mod. 384. No action of trespass will lie for a lessee for years against the lessor, although he distrain without cause; Anon. 11 Mod. 209. n.; see also Dalt. 3. Trespass does not lie against one who finds goods, or one to whom goods are bailed or lent, though he refuse to deliver them; 1 Ro. 130; 2 Saund. 47. p. If a defendant in custody upon mesne process tender a bail bond with sufficient sureties to the bailiff, and he refuse it, yet an action of trespass will not lie against him; but the party injured may seek his remedy by an action on the case against the sheriff; Smith v. Hall, 2 Mod. 32. It will not lie against the sheriff for executing process, though it were erroneous; Cox v. Barnsley, Hob. 48. Trespass and false imprisonment will not lie against the gaoler of a liberty for delivering a prisoner committed to his custody under a warrant from the bailiff, although the arrest was made out of the bailiff's jurisdiction; Olet v. Bessy, 2 Show. 149. 205. It will not lie against a pound keeper for merely receiving cattle, though the taking was tortious; if, in so doing, he keep within the strict line of his duty; 2 Show. n. An officer shall not be made a trespasser by relation; Comb. 124.

mentioned were one and the same, or different trespasses. It was proved for the plaintiff, that the defendants entered for the first time about the 10th of April, that the goods were sold by auction on the 26th, against the plaintiff's will; and that possession was kept till the 6th of May, which was the day after the return of the writ. Mansfield, C. J., who tried the case, was of opinion that this only proved one continued trespass; and the defendants in consequence obtained a verdict.

[ 131 ] Lord Mansfield, C. J. In the case cited from East, the defendant was bound to remove the goods within five days; the continuing, therefore, on the premises after that time was a distinct trespass; but in the present case who can fix the period when the first trespass ceased, and the second began?

Trespass  
may be  
joint or sev  
eral;

2. *ANON.* M. T. 1698. K. B. 12 Mod. 331.

Holt, C. J. Trespass may be joint or several, as the plaintiff pleases, though the fault be the same in respect to him; but is several as to the agent, because the act of one is not the act of the other.

3. *BAYLY v. RABY.* E. T. 1720. K. B. 1 Stra. 420.

And the  
Court will  
not consoli  
date ac  
tions of  
this descrip  
tion.

It was moved that four several declarations in trespass against four different persons might be put into one, or an affidavit that the trespass, if any, was committed by all jointly. *Per Cur.* We never went so far as the case of different persons, but only where the declarations are between the same parties. The plaintiff may have the benefit of the other's evidence in his action against either; but this will be to deprive him of that.

## V. RELATIVE TO WHAT FORCE MAY BE USED TO REMOVE.

*GREEN v. GODDARD.* M. T. 1703. K. B. Salk. 641.

If a enter  
peaceably,  
he must be  
requested  
to leave be  
fore force  
is applied;  
if forcibly,  
he may be  
instantly re  
sisted by  
force.\*

Trespass, assault, and battery laid. The defendant, as to the *vi et armis*, pleaded not guilty, and as to the residue, that, long before a stranger's bull had broke into his close, that he was driving him out to put him in the pound, and the plaintiff came into the said close, and "*manu forte impedit ipsum ac taurum præd. recussisse voluit, et quod ad præveniend. &c. ipse idem defend. parvum flagellum super quentum molliter imposuit, quod est idem residum, &c. absque hoc quod cul. fuit ad aliquod tempus ante, eundem 13 diem.*" The plaintiff demurred: the counsel for the plaintiff argued, that they should have requested him to go out of the close; 18 Hen. 6, 91; 11 Hen. 6, 23; 2 Ro. Trespass, 547, 548, 549; and that *flagellum molliter imponere* is repugnant; 1 Sid. 4.

*Per Cur.* There is a force in law, as well as in every trespass *quare clausum fregit*. As, if one enters into another's ground, in that case the owner must request him to depart before he can lay hands on him to turn him out; for every *impositio manuum* is an assault and battery, which cannot be justified upon the account of breaking the close in law without a request. The other is an actual force, as in burglary, as breaking open a door or gate, and in that case it is lawful to oppose force to force; and if one breaks down the gate, or comes into my close *vi et armis*, I need not request him to begone, but may lay hands on him immediately, for it is but returning violence with violence. So if one comes forcibly and takes away my goods, I may oppose him without warning, for there is no time to make a request.

[ 132 ]

## VI. RELATIVE TO THE ACTION FOR.†

### (A) DECLARATION.

(a) *Title of the court.* See ante, tit. Declaration.

(b) *Title of the term.* See ante, tit. Declaration.

\* Trespass does not lie for chasing plaintiff's sheep out of defendant's land, which were trespassing there; *Millen v. Fawtrey*, W. Jo. 131.

† Trespass *vi et armis* cannot be tried in an inferior court; *Lambert v. Thurston*, 3 Salk. 249; *Wing v. Jackson*, 1 Mod. 215; *sed vide* *Lane v. Robinson*, 2 Mod. 102. Trespass *vi et armis* may be brought in B. R., and the damages laid to any amount, though under 40s.; *Lambert v. Thurston*, 2 Carth. 108.

(c) *Venue.\**(d) *Recital of the writ.*

FRANKLIN v. REEVE. M. T. 1735. K. B. Stra. 1023.

Error on judgment of C. B. in trespass; where after recital of the writ, The recital of the writ may aid a defect in the count.† the plaintiff counted for taking and carrying away several loads of dung and soil without saying *ipsius querentis*; and, after a verdict, that was objected, and held that this was such a defect of title in the count as could not be aided by the verdict, which aids not a defective title, but only a title defectively set forth. But though the count was held ill yet the Court thought it may be made good by the recital of the writ, which had shown them to be the dung and soil of the plaintiff, and was to be taken as part of the declaration, according to the cases in Cro. Jac. 536; 1 Sid. 150, 187; 1 Keb. 699, 727; Lutw. 1529; 1 Mod. 219. And, though it was agreed there was no original (which otherwise they would have set up for by certiorari), yet as the want of that was aided by the verdict, the judgment should be affirmed.

(e) *Statement of time and the continuando.*

MORFOTON v. ASHLEY. M. T. 1703. K. B. 6 Mod. 38; S. C. 2 Salk. 638.

Trespass for breaking the plaintiff's close, treading down his grass and hunting and killing his rabbits, on divers days and times, from such a time, it was used with a *continuando* of the said trespass, as to all the particulars, is good: for al to do it with a *continuando*.‡

(f) *Statement of title.*

CROWDER v. OLDFIELD. M. T. 1703. K. B. 6 Mod. 21.

Powell, J., who was of the Common Pleas when judgment was there given, agreed that one may declare in an action for damages upon his possession, without any further title against a wrong-doer; and he agreed the case of Bust v. Stroud, upon a *legitime possessionatus*, for hindrance of common, to be good, because it was against a stranger and a wrong-doer; but against the owner of the soil you must make title.

\* In trespass for injuries to real property the *venue* is local; 11 Mod. 101; but if it be for taking goods, or wrongs done to a personal chattel, it is transitory, and may be laid in any county.

† If a writ of trespass be for entering into a house and two closes, and the declaration state a trespass in a house and in one close and one toft, the variance is fatal, for a toft only signifies the ground on which a building was before erected, and so excludes the idea of a close; Skidmore v. Barchier, 2 Show. 93, 225.

‡ It is not necessary to state the precise day on which the trespass was committed, it will be sufficient to insert any day before the commencement of the action. In stating the place, naming a vill or parish is sufficient; 1 Saund. 347. a. In trespass for breaking a house in such a parish and ward in L. upon not guilty, the jury found the house was in the parish but not in the ward, but held good, being admitted by the parties, and that the latter words were superfluous; Hassall v. Juxen, Cro. Eliz. 281.

§ It was formerly the practice to declare with a *continuando*, that is, alleging "that defendant on such a day committed certain trespasses, and continued the said trespasses from such a day to such a day, at divers days and times;" but it is now more usual in actions for trespasses on land to state, "that the defendant on such a day, in such a year, and on divers other days and times between that day and the exhibiting the bill, with force and arms committed several trespasses." The precise day being stated in the declaration is not material; for the plaintiff may prove the defendant guilty at any time anterior to the commencement of the action, though it be prior or subsequent to the day laid in the declaration, Co. Litt. 280; and he may give evidence of any number of trespasses committed during the period specified. Where acts terminate in themselves, and, when once done, can never be re-committed, there can of course be no *continuando*, as killing a number of hares, each of which is a separate act; and, therefore, where trespasses are laid in a *continuando* that cannot from their nature be continued, exception should be taken at the trial; for the plaintiff ought to recover but for one trespass, Bul. N. P. 86; and if several trespasses are alleged in one declaration, and some of them might be, without any palpable incongruity, laid with a *continuando*, and some after verdict, the Court will intend that the jury had not given any damages for those which could not lay in a *continuando*; Ld. Raym. 240.

|| In trespass, plaintiff need not make title, as, in trespass for diverting a water course, the plaintiff need not show his title thereto; Rex v. Jenner, Fort. 378; Glyn v. Nichols, Comb. 41. 43.

The injury should be alleged to have been committed *vi et armis*.†

[ 134 ]

In stating the cause of action, if in trespass to real property,† the description need not be by name or a buttals.§ If to personal property, its description must be accurately stated.¶

(g) Statement of the subject matter.\*

ANON. E. T. 1631. K. B. 12 Mod. 21.

In trespass. The declaration was without *vi et armis*. Upon general demurrer, this omission is fatal, for it is substance, and alters the entry of the judgment, which ought to be with a *capias* when the action is *vi et armis*; otherwise, with *misericordia*.

2. MASTERS v. KESTERTON. E. T. 1785. C. P. 2 Black. 1089.

Trespass for breaking and entering, and doing damage, in several closes of the plaintiff at Lambeth. The defendant demurs, for that the number of closes is not stated or set forth in the declaration, neither are they named or sufficiently described therein, whereby the defendant is unable to collect the supposed cause of action, or make any answer thereto: joinder in demurrer.

Blackstone, J. I have looked into this matter with some attention, and I conceive that anciently, upon a writ of *quare clausum fregit*, the plaintiff might (and may still) declare either generally for breaking his close at A., or might name the close in his count, as of breaking and entering his close, called Blackacre, in A., or might otherwise certainly describe the same.

3. BERTIE v. PICKERING. M. T. 1796. K. B. 4 Burr. 2455.

*Per Cur.* In a declaration in trespass to personal property, the property must be accurately described.

\* The injury should be stated directly and positively; and not by way of recital, and therefore a declaration, "For that whereas," or "wherefore," the defendant committed the action complained of, is bad on special demurrer; 2 Salk. 636; Com. Dig. Pader, c. 86. In assault and battery, with two counts, the first was good, the second was with *cumque etiam*, and entire damages; judgment was arrested; Rudge v. Onon, Fort. 376. A second count in a declaration in trespass, beginning with *quod cum* may be amended; Wilder v. Handy, Stra. 1151; Marshall v. Riggs, 2 Ld. Raym. 1162. *Necnon de eo quod*, after a *quod cum*, is a positive charge; Dobs v. Edmonds, Stra. 681.

† A declaration in trespass without *vi et armis* was formerly bad on general demurrer. Wildgoose v. Burgess, Salk. 636; Cro. Jac. 443; Anon. 12 Mod. 24; though the omission of *vi et armis* in the count part in trespass in the C. P. did not hurt, if those words were in the writ, Lutw. 638; and now the only mode of taking advantage of the omission is by special demurrer, 4 & 5 Anne, s. 16; see Day v. Markett, 2 Ld. Raym. 985.

‡ In trespass, plaintiff need not make title, as, in trespass for diverting a watercourse, the plaintiff need not show title thereto; Rex v. Jenner, Fort. 378; Glyn v. Nichols, Comb. 41. 43. A count in trespass, that the defendant *clausum fregit et herbam suam et pratum, viz. decem acres prati spoliavit*, of the value of, &c. in the close aforesaid, then and there growing," is bad; Anlaby v. Welborne, 2 Show. 465. But trespass for entering his house, and taking several calves; &c. was held good, without showing the number; Salk. 645; Anon. 1 Vent. 272. In trespass *quare arbores succidit*, the declaration was held insufficient, because not expressed what kind of trees; 1 Vent. 53. So of fishes, for not stating the number and kind, and not aided by verdict; Anon. 1 Vent. 272. 329. Trespass, for carrying away *diversa onera equina* of gravel, held bad for uncertainty, and not aided by verdict; Blake v. Clattie, 2 Vent. 73. So *diversas pecius maheremis cepit* &c. naught for the uncertainty; Leachmere v. Toplady 2 Vent. 262.

§ It is generally advisable in trespass *quare clausum fregit* to state the name of the close, and its buttals, in order to avoid the necessity of a new assignment, Bal. N. P. 89; in case the defendant should plead *liberum tenementum*; but particular care ought to be taken that such description correspond precisely with the facts, otherwise the plaintiff may be nonsuited; 1 T. R. 479.

¶ In trespass for taking and carrying away goods, the value of the goods must be stated; Anon. 2 Show. 149. Trespass omitting the value of the goods is ill on a general demurrer; 2 Lev. 230. Declaration in trespass for taking goods is bad, unless it state the goods to be the plaintiff's, but it may be made good by defendant's plea; 1 Sid. 184. Trespass for taking and carrying away certain beasts of the plaintiff viz. one horse, &c. and also one cart, is not good, unless "the property of the plaintiff" be repeated in the declaration after each article; Cannet v. Collingdell, 2 Show. 395. In trespass for taking "two cows at A., and also a load of wheat, the goods of the plaintiff, there found," the words "the goods of the plaintiff" refer only to the wheat, and therefore the trespass for taking the two cows is ill laid, inasmuch as the declaration does not state that they were the goods of the plaintiff; Jose v. Mills, 6 Mod. 15. Trespass *quare duos equos apud D. et triticum de bonis propriis ipsius A. &c. cepit*, held ill; because the property of the horses not shown, and the damages entire. Salk. 640. Trespass *vi et armis* for taking the mare *ipsius querentis necnon bona et catalla sequent.* and sums them up, but does not say that they were goods *ipsius querentis*; and on demurrer it was held, the plaintiff might have judgment for the mare, and release the action for the residue; Cutforthay v. Taylor, T. Raym. 395.

## (h) Statement of damages and conclusion.

[ 135 ]

## 1. DOVE v. SMITH. E. T. 1704. K. B. 6 Mod. 153.

In trespass for breaking the defendant's close and treading his grass. It appeared on evidence, that the plaintiff had a close adjoining to the back part of the defendant's house, which was a public-house; and the defendant sometimes used to set a table for his guests in the said close, and serve them there, and that he often used to walk there for his own pleasure, and with others who shot with bows and arrows there.

Holt, C. J. You may give evidence of the value of the damages done, or you cannot recover, for the law goes by evidence.

## 2. MELWOOD v. LEECH. E. T. 1698. K. B. 1 Ld. Raym. 38.

Trespass. The words *contra pacem* were omitted in the declaration; and, therefore, after execution of a writ of inquiry, it was moved in judgment. But Holt, C. J., seemed to incline that it would have been good after verdict.

## (B) PLEAS.

## (a) In denial, the general issue,† and what may be given in evidence under it.

And the declaration should conclude *contra pacem*.†

[ 136 ]

## 1. FURNEAUX v. FOTHERBY. H. T. 1815. N. P. 4 Camp. 136.

By stat. 11 Geo. 2, c. 19, s. 21, in actions of trespass brought against any person entitled to rents or services of any kind, their bailiff, or receiver, or other person, relating to any entry by virtue of this act or otherwise, upon the premises chargeable with such rent or services, or to any distress, or seizure, or sale, or disposal of any goods or chattels thereupon, the defendant may

The 11 G. 2. admitting evidence under the general issue, that the defendant entered to

\* Trespass for breaking into the plaintiff's house, and assaulting and beating his servant is good; Salmon v. Ballock, 2 Show. 478. For the assault, &c. may be inserted by way of aggravation of damages; Salk. 642. Where the declaration was for entering into a ship, taking away goods, converting them, assaulting and menacing the mariners, and imprisoning the master, so that they could not proceed on their voyage, it was objected that here was a case and trespass *vi et armis*, and trover and conversion, all jumbled in one count; but it was held good, as it was only in aggravation; Clayton v. Cotesworth, 1 Show 179. 180. In trespass against husband and wife, the declaration may state the conversion to have been to their own use; 2 Saund. 47. m. If a wife be falsely imprisoned, a declaration by husband and wife, with a *per quod* his domestic concerns remained undone, and concluding to the damage of both is good; Russel v. Corn, 6 Mod. 127; Comb. 184. Trespass for entering the house of A., and taking the goods of B., *ad damnum ipsorum*, after a verdict and entire damages, the judgment was arrested; Maddox v. Taylor 8 Mod. 370.

† The omission of the conclusion of *contra pacem* was formerly held to be matter of substance, but it must now be specially demurred to, Comb. 108; 2 Chitty Pl. 847. n. The want of *contra pacem* is aided after verdict by the 21 Jac. 1. c. 13; Musgrave's case, W. Jo. 172. Trespass laid in the time of King William and against the peace of Queen Anne, is bad on demurrer, but good after verdict; Day v. Munkett, 6 Mod. 80; Salk. 640. Where the plaintiff counts of a trespass done, part in a former king's time, and part in the present king's time, he shall allege it to be against the peace of both kings; Plow. 38; 1 Ro. 259; 1 Show. 28.

‡ In trespass either to real or personal property, the general issue is, not guilty; and if the action be concerning the former, it puts not only in issue the fact of the trespass, but also the title, evidence of which, and of the right of possession, is admissible as a demise from the owner of the land, 7 T. R. 354; or the defendant may prove that at the time of the supposed trespass the freehold and right of possession were in a third person and that he entered by his command; 8 T. R. 403. The plea of not guilty is proper in trespass to persons, if the defendant committed no assault, battery, or imprisonment, &c., and in trespass to personal property, if the defendant were not guilty of taking, &c. 8 T. R. 403; and in trespass to real property this plea not only puts in issue the fact of the trespass, &c. but also the title, whether freehold or possessory in the defendant, or a person under whom he claims may be given in evidence under it; which matters show *prima facie* that the right of possession, which is necessary in trespass, is not in the plaintiff, but in the defendant, or the party under whom he justifies; 8 T. R. 403; 7 T. R. 254; Willes, 222. But where the act would at common law *prima facie* appear to be a trespass, any matter of justification to excuse, or done by virtue of a warrant or authority, must in general be specially pleaded: 2 Campb. 378, 379. 500; Co. Lit. 282. b. 283. a.; Dougl. 611; 2 Rol. Ab. 682; 12 Mod. 120; 1 Saund. 298. n.; 1 Com. Dig. Pleader, E. 15, 16, 17.

§ But under this plea the defendant cannot prove a licence from the plaintiff, 2 T. R. 166; or a right of way, Gilb. E. 217, or incorporeal right, Com. Dig. Pleader; E. 15; 2 Wils. 173; and where the act would, at common law, *prima facie* appear to be trespass, any matter of justification or excuse must in general be specially pleaded; Ibid. 12 Mod. 120.

take a distress for rent, only applies to where the distress is made on the premises as demised.

plead the general issue, and give the special matter in evidence; *Vaughan v. Davis*, 1 Esp. N. P. C. 257. Lord Ellenborough, C. J. In that case the tenant had removed his goods clandestinely from the demised premises, but the landlord had seized them as a distress within thirty days, as allowed by the preceding stat. 11 G. 2, c. 19, s. 1. It was holden that to an action of trespass brought by the tenant against the landlord for such seizure, the defendant could not give the special matter or evidence upon the general issue by virtue of the preceding clause (s. 21,) for that clause is confined to those cases where the distress is made upon the premises demised. In this case, the defence must be pleaded specially.

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And under the general issue a common or other case cannot be given in evidence.

2. *HAWKINS v. WALLIS*. T. T. 1763. C. P. 2 Wils. 173.

Trespass for nailing trees against the plaintiff's wall. After not guilty pleaded, and verdict for the plaintiff, it appeared on a case reserved, that the plaintiff was possessed of a green-house, the back wall adjoining to the defendant's close, and that the defendant nailed the trees growing in his close to the wall of the green-house, which was the absolute property of the plaintiff, and that the defendant had used so to nail his trees for thirty years last past, without interruption; it was insisted that this long usage was a possession of the back part of the wall in the defendant, though the property of the wall was in the plaintiff; but it was resolved that this was no possession in the defendant, but an easement only, and could not be given in evidence upon the general issue, for whoever claims an easement must plead it specially. The long enjoyment in this case would perhaps have been evidence of a licence to nail fruit trees to the wall in case a licence had been pleaded; but if this should be allowed to be evidence of such an actual possession of the wall in the defendant as to oust the plaintiff of his possession, it would tend to introduce a confusion of property, for it is the constant practice in all places for persons to nail fruit trees to the walls of their neighbours; see *Bac. Ab.* tit. *Trespass*. Judgment for plaintiff. Gould, J., adding: "Suppose the wall falls down, it being the plaintiff's property and fence next the defendant's close, the plaintiff must rebuild it, or the defendant might have an action against him."

(q) *In discharge.\**

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1st. *Accord and Satisfaction.*†—See also *ante*, tit. *Accord and Satisfaction*.  
2nd. *Release.*‡ 3rd. *Licence.*

*DENNETT v. GREVER*. M. T. 1782. C. P. Wilses, 195.

A licence must be pleaded; § and where

In trespass against A., B., and C., for breaking and entering plaintiff's house, and continuing there ten days, and selling divers goods, the defendants pleaded that before the time, when, &c., the plaintiff licensed A. to enter the

\* In all actions of trespass, whether to the person, personal or real property, matters in discharge of the action must be pleaded; 3 Burr. 1353; 1 Bla. Rep. 388; 1 Wils. 45.

† Accord and satisfaction is a good plea in trespass, but accord alone, without satisfaction, cannot be sustained, 3 Burr. 1353; 9 Rep. 18; and in this plea, it should be shown how the satisfaction is performed, *Str.* 391; to which the plaintiff in his replication may deny, or state that it was for a distinct and different trespass; or he may allege that the defendant has been guilty of a trespass subsequent to the accord; *Com. Dig.* *Pleader*, 3. n. 12.

‡ If a trespass be joint, a release to one is a bar for all, for though a trespass be committed by several, yet it may be either against one or against all, for in trespass all are principals, and each is answerable for the act of his co-trespasser, and as there can be but one satisfaction, a release is a release of the trespass, and all have equal benefit; *Hob.* 66.

§ Licence to enter and occupy land for a certain time amounts to a lease and ought to be pleaded as such; *Adm. Per Cur.* 5 H. 7. 1. a. cited in *Plowd.* 542. a.

1. Where an entry, authority, or licence, is given to any person by law, and he abuses it by the commission of some act, he shall be considered as a trespasser *ab initio*, i. e. from the first entry; for the law determines from the subsequent act *quo animo* or to what intent the original entry was made; as, if a person enters an inn or tavern, and afterwards commits a trespass by carrying away anything, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass he shall be a trespasser *ab initio*; but in such a case if the party is guilty of a mere non-feasance, as in the case of an entry into an inn, and refusing to pay for the liquor which he has consumed, *Six Carpenters' case*, 8 Rep. 146; there he cannot be considered as a trespasser *ab initio*, because a mere non-feasance does not amount to a trespass.

2. Where the entry, authority, or licence, to do any thing is given by the party, there,



house, and to continue therein for the sale of his goods, by virtue of which licence A., in his own right, and B. and C. as his servants, peaceably entered the house by the door, then open, to sell the said goods; and in and about the sale of the goods necessarily continued in the house for ten days, &c., concluding with a verification. On demurrer, it was objected that the licence was personal to A., and, consequently, it could not justify the entry of any other person, and at least it ought to have appeared on the face of the plea that the entry of the other defendants was necessary for the purpose mentioned in the licence. But the Court overruled the objection, Willes, C. J., observing that unless a man could sell goods to himself, it was absurd to contend that this was a licence to A. only to go into the house; besides, it was highly probable that he might want to take several persons with him, in order to assist in the sale; and this is sufficiently set forth in the plea, for it is alleged that all three necessarily continued in the house for ten days to sell the said goods; and if their continuance therein were necessary, their entrance must certainly be so too, and was, therefore, sufficiently alleged.

4th. *Judgment recovered.*

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OUTRAM v. MOREWOOD. H. T. 1803. K. B. 8 East, 346.

To an action of trespass for digging and getting coals out of a coal-mine, A. alleged by the plaintiff to be within and under his close, called the Cow Close. The defendant pleaded, and showed title regularly brought down to them in right of the wife, by fine, recovery, &c., from one Sir John Zouch, who, in the 39th year of Elizabeth, was seised in fee of the manor of Alfreton, and of certain messuages and lands within the manor; by virtue of which title they claimed all the coals under those lands, except such as were within and under any of the messuages, buildings, orchards, and grounds, which, at the time of a recovery suffered in the reign of Queen Elizabeth, were standing, and being upon the said lands and tenements; and which coal-mines, with the exceptions aforesaid, passed under a bargain and sale from Sir John Zouch to certain bargainees; and that defendants averred that the coals in question were under the lands of the former owner, Sir J. Zouch, and were derived by bargain and sale to certain immediate bargainees, and from them to the defendant, the wife, and were not within or under any of the messuages, buildings, orchards, and gardens, which were the subject of the exceptions. To this plea the plaintiff replied; and relied by way of estoppel upon a former verdict obtained by him in an action of trespass brought by him against one of the defendants, Ellen, the wife of the other defendant, she being then the sole, in which he declared for the same trespass as now; to which the wife pleaded, and derived title in the same manner as now done by her and her husband, and alleged that the coal-mines in question, in the declaration mentioned, were, at the time of making the before mentioned bargain and sale by Sir John Zouch, parcel of the coal-mines by that indenture bargained and sold; upon which point, viz. whether the coal-mines claimed by the plaintiff, and mentioned in his declaration, were parcel of what passed under Zouch's bargain and sale to the persons under whom the wife claimed, an issue was taken and found for the plaintiff, and against the wife. The question was, whether the defendants, the husband and wife, were estopped by this verdict, and judgment thereupon, from averring in the present action (contrary to the title so there found against the wife) that the coal mines in question were parcel of the coal mines bargained and sold by the before-mentioned indenture. It was holden that the husband and wife were so estopped, and, consequently, that the plaintiff ought to recover.

although the person to whom the authority is given may, by the commission of subsequent acts, be a trespasser, yet such subsequent acts will not affect the original entry so as to make that which is sanctioned by the authority of the party complaining a trespass. In this case, therefore the subsequent acts only amount to trespasses.

\* But such a grant, will not of course, warrant the commission of an act beyond its prescribed limits, for the privilege exercised under it must be co-extensive with, and not exceed, the terms and modifications authorised by the licence; 3 Campb. N. P. C. 80; 6 East, 208.

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5th. *Tender of Amends.\**6th. *Limitation, statute of.†*(c) *As connected with the person.* See also *ante*, tit. Assault and Battery.

WEAVER v. RUCH. M. T. 1798. K. B. 8 T. R. 78. JONES v. WHITELEY. E. T. 1770. C. P. 3 Wils. 71.

A justification in defence of the possession of real or personal property must be pleaded. § 4  
A justification for a trespass as to personal property with or without process must be pleaded specially. § 5

To trespass for assault and battery, the defendant pleaded that the plaintiff with force and arms, and with a strong hand; endeavoured forcibly to break and enter the defendant's close; whereupon the defendant resisted and opposed such entrance, &c.; and if any damage happened to the plaintiff it was in defence of the possession of the said close; Willes, 17; 4 Taunt. 821. The Court held it proper.

(d) *As connected with personal property.*

MILMAN v. DOLWELL. H. T. 1810. N. C. Campb. 378.

Trespass for cutting the plaintiff's barges from their moorings in the river Thames; whereby they had been set adrift and injured. It appeared that at a time when there was a great quantity of ice in the Thames, the defendant took two barges of the plaintiff from the middle of the river, where they were

\* The stat 21 Jac. 1. c. 16. enacts, "That in all actions of trespass quare clausum fregit, the defendant may plead a disclaimer of title to the locus in quo, and that the trespass was involuntary and proceeded from negligence, with an averment of having tendered sufficient amends prior to the commencement of an action;" but it is worthy of remark, that a tender of amends alone cannot be pleaded by the defendant, for the statute only authorizes such a plea in the case of an involuntary trespass and disclaimer; 2 Rol. Abr. 570, 571. By several statutes particular persons are authorised to tender amends, and plead the offer of recompence in bar; see *ante*, tit. Justice of the Peace.

† This defence must also be specially pleaded, which in trespass to persons is that the defendant was not guilty within four years; and in trespass to personal or real property, within six years; 21 Jac. 1. c. 16. s. 8.

‡ So, the plea of not guilty is proper in trespass to persons, if the defendant committed no assault, battery, or imprisonment, &c.; and in trespass to personal property, if the plaintiff had no property in the goods, or the defendant were not guilty of the taking, &c. *Id. ibid.*; and in trespass to real property this plea not only puts in issue the fact of the trespass, &c. but also the title, whether freehold or possessory, in the defendant or a person under whom he claims, may be given in evidence under it, which matters show *prima facie* that the right of possession which is necessary in trespass is not in the plaintiff but in the defendant, or the party under whom he justifies; 8 T. R. 403; 7 T. R. 354; Willes, 222. But where the act would at common law *prima facie* appear to be a trespass, any matter of justification or excuse, or done by virtue of a warrant or authority, must in general be specially pleaded, 2 Campb. 378, 379, 500; Co. Lit. 282. b. 283. a.; Doug. 611; 2 Roll. Abr. 682; 12 Mod. 120; 1 Saund. 298. n. l.; Com. Dig. Pleader, E. 15, 16, 17; (except in some cases under particular statutes, see *ante*, tits. Churchwardens; Constables; Justices of the Peace, Sheriff); though by authority of law, without process either as an individual, 6 T. R. 582. or as an officer, or in aid of him, 1 Saund. 10. 79. *Id. ibid.* or under civil process, either mesne or final, 3 Wils. 370; 1 Saund. 293. n. 1; of superior, *Ibid.*; or inferior or foreign courts, must be pleaded specially, 2 East, 260. 274. for whoever imprisons another, may justify himself by pleading, and show specially to the Court that the imprisonment was lawful. This is a positive rule of law in order to prevent surprise on the plaintiff at the trial, by the defendant then assigning various reasons and causes of imprisoning the plaintiff, of which he had no notice, and which consequently he could not be prepared to meet at the trial on the plea of not guilty, on fair and equal terms with respect to the evidence and proof of facts: Co. Lit. 282. b. 283. a.; 3 Wils. 370, 371. But if a person touch another in conversation or in joke or otherwise, without intent to insult him, no special plea is necessary; Rep. Temp. Hardw. 301; 1 Selw. 33.

§ But a seizure as an harlot service, Cro. Eliz. 32; 2 Saund. 168. a. b. or for poor rates, 43 Eliz. c. 2. s. 19. may be given in evidence under the general issue; but, in general, matters which admit the plaintiff's property as well as the seizure, &c. must be pleaded, Com. Dig. Pleader, 3 M. 25; as a justification for cutting ropes or killing dogs, 1 Saund. 84; 2 Lutw. 1494; Com. Dig. Pleader, 3 M. 33; 1 Taunt. 570; 2 Camb. 511; or taking guns, &c., or even the licence of the plaintiff to do the act complained of, 2 Campb. 378, 379; or that it was occasioned by his own negligence; 2 Campb. 500. A distress for rent when made on the demised premises may be given in evidence under the general issue, 11 Geo. 2. c. 19. s. 21; but if made off the demised premises, as on a common, or under a fraudulent removal, the defence must be specially pleaded, 1 Esp. Rep. 257; 4 Campb. 130; and a distress or seizure for tolls, stallage at a fair, &c., 3 Lev. 224. under a bye law, or for damage feasant, by the occupier, 1 Saund. 221; 2 Saund. 294; or a commoner, 2 Wils. 51; Yelv. 106. 291; 1 Saund. 346. must be pleaded specially; 2 Campb. 378, 379, 500.

moored, to the opposite shore, and that one of them was immediately after discovered to have a hole in its bottom; but there was no evidence to show how this had been occasioned. The defendant offered to prove that at the time of the supposed trespass these barges were in the greatest danger of being carried away by the ice; that if he had not interfered they most probably would have been destroyed; that he did what was prudent and most for the plaintiff's advantage to be done under the circumstances; and that if he had been employed by the plaintiff generally to take charge of the barges, he must be presumed to have had his authority to remove them from a place of danger to a place of safety. Lord Ellenborough. These facts should have been specially pleaded. I cannot admit evidence of them under the plea of not guilty; the issue joined upon is, whether the defendant removed barges belonging to the plaintiff from their moorings, not whether he was justified in doing so.

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(c) *As connected with real property.*

1st. *In general.\**

2d. *Liberum tenementum.†*

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3d. *Right of way.* See *post*, tit. *Way*.

(C) *NEW ASSIGNMENT.* See *ante*, tit. *New Assignment*.

1. *CHEASELEY V. BARNES.* T. T. 1808. K. B. 10 East, 79.

*Per Cur.* In *Adney v. Vernon* (a) 3 Lev. 243, where the declaration charges a breaking and entering of the plaintiff's close on different days, if the defendant pleaded a justification, which in the form of it embraces the whole declaration, the plaintiff may by his new assignment show that he broke and entered on different days, and for other purposes than those justified; and there is no inconsistency in that, because the defendant's justification may apply in evidence to different days and purposes from what the plaintiff complains of.

In trespass to the person the plaintiff may deny the subject matter of the justification, and at so new as sign.‡

\* In trespass to real property, a freehold or mere possessory right in the defendant may be given in evidence under the general issue, 7 T. R. 354; 8 T. R. 403; Andr. 103; Willes, 222; but it has been held that the defendant cannot justify, under the general issue, cutting the posts and rails of the plaintiff, though erected upon the defendant's land, there being no question raised as to the property remaining in the plaintiff; 8 East, 404; *sed quere*, see 8 T. R. 408. Even if a tenant in agriculture let in or affix any thing to the freehold it becomes part thereof and the property of the lessor. Should it not, *a fortiori*, be so as to a trespasser? An excuse of the trespass, on account of a defect of fences, which the plaintiff was bound to repair, Co. Lit. 283; 2 Saund. 285; and a licence from the plaintiff, 2 Campb. 379; 2 T. R. 168; Hob. 175; Gilb. C. P. 6; Vin. Ab. Licence; Com. Dig. Pleader, 3 M. 35; but see 21 Hen. 7. 28. Pl. 5; and a justification under a rent-charge, or in respect of any easement or incorporeal right, per Lord Loughborough, 1 Hen. Bl. 352; 2 Saund. 412; n. 1; Co. Litt. 283; 2 Wils. 173; Com. Dig. Pleader, E 15; as common of fishery, Com. Dig. Piscary; or of pasture, 1 Saund. 25. 340; 2 Saund. 2; or of turbary, 6 T. R. 748; must be pleaded. So the defendant must plead an entry by authority of law without process, as that the *locus in quo* was in another, Com. Dig. Pleader, 3 M. 35; or that the defendant entered to demand payment of his debt, Id. *ibid*. Cro. Eliz. 876; or to prevent murder, 2 Bos. and Pul. 260; or by virtue of process, 1 Saund. 298. n. 1; criminal or civil, of a superior, 3 Bos. and Pul. 223; or inferior court, 7 T. R. 635; Lutw. 914; under mesne process, as a latitat. &c., 3 Bos. and Pul. 223; or under final process, as a *feri facias*. And in trespass to land, where there is a removal of personal property, it must be special, and show possession of some land, &c., and justify the removal, &c., damage assaut, &c., 8 East, 404; Willes, 222. n. 1.

† It is usual and frequently expedient in addition to the general issue, to plead *liberum tenementum* in order either to compel the plaintiff to new assign and describe the particulars of the close and its appurtenances or, in case he claims as tenant to the defendant, or the person on whose behalf the supposed trespass was committed, to oblige him to set forth the tenancy, which the defendant, in his rejoinder, may insist has been determined by matter subsequent as notice to quit, &c., Saund. 299. b.; and the defendant, under the plea of *liberum tenementum*, has the privilege of selecting what parcels to which he will apply his plea; and if the plaintiff insists upon a trespass in other parcels, he must newly assign; 2 Taunt. 156.

‡ It is a general rule, that where the defendant has committed several trespasses, either upon the person, personal property or real property of another, some of which were justifiable and others not, and the action is brought for those trespasses which are not justifiable but the defendant by his plea answers those only which were, then the plaintiff should

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If in trespass for taking personal property the defendant by his plea make a local justification, the plaintiff may new assign.† In trespass to real property, if defendant plead that he entered a house under licence, and the plaintiff reply subsequent unlawful conduct in his house, he must new assign.

## 2. EMERSON V. SELBY. H. T. 1703. K. B. 2 Ld. Raym. 1015.

To trespass for taking away the plaintiff's oaks, the defendant pleaded that the oaks were standing in a certain close called A., situate in the manor of O., the freehold of B., who felled them, and justifies taking them away by the command of B.: it was held, that the plaintiff might new assign that the oaks were growing in the plaintiff's close within the manor of W., and were other oaks, &c. than those mentioned in the plea; and in these transitory actions, not only the place, but the time, may be made material by the plea, and then the plaintiff must new assign the trespass another time. See Lev. 110, 111.

## 3. DILLHAM V. BOND. H. T. 1814. N. P. 3 Campb. 524.

To trespass for breaking and entering the plaintiff's house, and making a noise and disturbance therein, the defendant pleaded a licence, to which the plaintiff replied *de injuria*; held that the plea was supported by evidence that the plaintiff kept a billiard-table in the house, at which all persons were usually permitted by him to play at regulated prices; and that the defendant entered the house for the purpose of going to the billiard-room, although while in the house he was guilty of a trespass in assaulting the plaintiff, since the plaintiff ought to have new assigned that fact.

new assign, 1 Saund. 299. a. note b; when not, see 11 East, 454. Thus in an action of trespass, if there have been two assaults, the one justifiable and the other not, and the declaration only contains one count for an assault, and the defendant pleads *son assault demesne*, the plaintiff should assign the illegal assault, 1 Saund. 292. a. n. b.; 2 Saund. 5 n. 3.; at conclusion, 2 Ld. Raym. 1015; Bull. N. P. 17; Esp. Rep. 38; 6 Mod. 117; 2 Selw. N. P. 32. acc.; Cro. Car. 514, 515; but if there are as many counts as there were assaults, &c., and some of them cannot be justified the plaintiff may prove those without a new assignment, and it would often be injudicious in such case to new assign; for where there have been two assaults, &c., and there are two counts, and the defendant pleads the general issue to the whole declaration, and a justification to one of the counts, the plaintiff had better put the justification in issue, and, in case the defendant prove it, give evidence of the second assault upon the second count; then make a new assignment; for if the plaintiff fail in the proof of the allegation in the new assignment he cannot afterwards have recourse to the second count, because by the new assignment he acknowledges that one of the assaults &c. is justified, and has therefore abandoned one count, and relies upon the assault, &c. in the new assignment therefore he cannot avail himself of one and the same act of assault, &c. both on the new assignment and on the second count; but if the plaintiff can prove two assaults, &c., besides that which he has waived, he might do so upon the second count; 1 Saund. 299. n. b. 6; 2 T. R. 177. So, if in answer to a plea justifying under process, &c., the plaintiff rely on an assault, &c. before the issuing of a writ, &c., or after the return of it or after the defendant was discharged by the plaintiff in the original action, or after a voluntary escape, that matter should be new assigned, 1 Saund. 299; Id. 299. n. 6; see the precedents and law, 2 Wils. 4; 2 T. R. 172; 10 East, 79; though if it were no arrest under a legal warrant, the warrant may be traversed; 16 East, 85. If the answer to a plea of *son assault demesne* be that the defendant was guilty of an immoderate battery, more than was necessary in self defence, it may be put on the record; Wils. Rep. n. b. *Sed quare*, if it should not be by replication instead of a new assignment, because it shows the defendant a trespasser *ab initio*; 1 Saund. 300. a.; 1 Hen. Bla. 560.

\* In actions of trespass to personal property, as there may have been two takings, or two injuries committed to the same property, consequently there may be a new assignment; 6 Mod. 120; Vin. Ab. Trespass, U. a. 4. pl. 22; Bac. Abr. Trespass, I. 4. 2.

† As, in an action for breaking and entering the plaintiff's house or land, or felling his timber, or taking away his goods, if the defendant plead a licence which the plaintiff had revoked before any of the trespasses were committed, or which was confined to some particular act, and the defendant exceeded it; the plaintiff must state the revocation or excess in a new assignment, 1 Saund. 300. a.; 2 Saund. 6. conclusion of note 3; but if more trespasses were committed than were licensed, the general replication denying the plea will suffice; 11 East, 451.

‡ If the declaration does not state the name or abutments of the close, &c. with such precision as to avoid the possibility of the defendant's having a close, &c., in the same parish of a similar description, and the defendant has pleaded *liberum tenementum* without describing the close, the plaintiff should new assign, and not take issue on the plea; for if he were he would fail upon the trial if the defendant could show that any close in the parish or place stated in the declaration was his freehold; 10 East, 80; 11 East, 51, 52; 2 Taunt. 156; 2 Salk. 453; 6 Mod. 119; Willes, 223; 2 Bl. Rep. 10-9; 7 T. R. 335; 1 Saund. 299. b. c.; Atherton v. Pritchard, E. 48. Geo. 3. Com. Dig. Pleader, 3 M. 34; Dyer, 32. *contra*. But where the plaintiff and defendant agree as to the close, the plaintiff cannot

(D) REPLICATIONS.\* As to the Person, see *ante*, tit. Assault and Battery.

(a) *De injuria*.

TAYLOR v. EASTWOOD. H. T. 1801. K. B. 1 East; 212.

In trespass for taking and driving the plaintiff's cattle, to which there was a justification that the defendant was lawfully possessed of a certain close, and that he took the cattle there *damage feasant*, the plaintiff may specially reply title in another, by whose command he entered, &c., and it does not vitiate the replication, that it unnecessarily proceeded farther to give colour to the defendant.

(b) *To plea of liberum tenementum*.

LAMBERT v. STROOTNER. M. T. 1792. K. B. Willes, 218.

To a plea of *liberum tenementum*, where the plaintiff replied that the place in question was the soil and freehold of the defendant, it was holden, on special demurrer, that the replication was good; for the words, "that it is the freehold of the plaintiff," were either to be rejected as surplusage, or to be considered only as inducement; that if the plaintiff had said that it was his freehold, *ubsequè hoc* that it was the freehold of the defendant, it would have been plainly an inducement only; and yet that was exactly the same case as the present, for there is not any distinction between traverses and denials.

new assign a trespass out of it, for that would be a departure from his declaration; 1 Saund. 300. If the defendant professing to answer the whole declaration does in reality justify only part of the trespass for which the action is brought, the plaintiff must new assign as to the residue; and if he doubt the truth of the justification, should also reply to it; for it is necessary in many cases to traverse, or otherwise answer the plea, and also to new assign.

\* The replications or pleas in trespass of matters in discharge in general resemble those in assumpsit; thus if a release be pleaded, the replication may be *non est factum*, or that it was obtained by fraud, Com. Dig. Pleader, 3 M. 12; or to a plea of accord and satisfaction, the plaintiff may deny the accord or state that it was for another trespass, with a traverse of the acceptance in satisfaction of the trespass complained of or he may allege that the defendant was not guilty after the accord, Com. Dig. Pleader, 3 M. 13; *sed quare*, if the plaintiff ought not in such a case to new assign; and to a plea of a distress for the same trespass he may reply that the cattle died in the pound, 1 Salk. 248; or to a plea of tender, that no tender was made, or that it was insufficient, Tho. Ent. 304; Com. Dig. Pleader, 3 M. 36; and to a plea of the statute of limitations the plaintiff may reply a writ, or any other matter of which he could avail himself in the action of assumpsit.

† And it appears to have been considered that this replication would also suffice, where in a similar plea it is stated that the defendant is seized in fee; 1 East, 213; 1 Brownl. 215; Com. Dig. Pleader, F. 21; 2 Saund. 295. b. n. 1; *sed vide* Willes, 103; 1 B. & P. 80; 12 Mod. 582. But if the defendant was justified as servant to another, Willes, 99; 1 B. & P. 80., or under a distress for rent, Willes, 52., or the taking and impounding and not merely the chasing of cattle, &c. Willes, 101; 2 Cro. Jac. 325., this replication will not suffice; and in cases where the general replication might not be bad in demurrer, it may nevertheless be advisable, and in some cases necessary to reply specially; as if there be two tenants in common, and one bring trespass against the other for taking his cattle, to which the defendant pleads that he took them *damage feasant*; in this case it seems that the plaintiff ought to reply specially that he was tenant in common with the defendant, and to show that he was not a trespasser; 1 East, 218; if the justification be under a *feri facias* or other process, the replication must be *de injuria* generally, but must state the particular answer to the plea, as in the case of trespass to persons. Where the answer to a plea confesses and avoids it, the replication should be special; thus the plaintiff ought to reply his right of common or defect of fences to a plea of a distress *damage feasant*; or he may show that the plaintiff converted such distress to his own use or abused it; 3 Wils. 26; 1 Salk. 221; Cro. Jac. 147.

‡ To this plea the plaintiff may reply several ways consistent with the actual fact; as when the plaintiff insists that the *locus in quo* is his freehold, or the freehold of another, then the replication should deny and directly controvert the adverse claim set up by the defendant, by replying that it is the freehold of the plaintiff, or of a third person and not the defendant's; or he may negative generally the defendant's right, without alleging his own or another person's claim to the freehold, Willes, 218; but if the declaration was general, without specifying the *locus in quo*, or abutments, and there be any reason to apprehend that the defendant will be able to substantiate that he is seized of any land in the same parish, it will be necessary to new assign, setting forth with greater minuteness and particularly the *locus in quo*, Com. Dig. Pleader, 3 m. 3; Willes, 223; but if the plaintiff derive title under the defendant, he must not deny its being the defendant's freehold, but should reply a demise or other title under him, Bul. N. P. 94; if the defendant has

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In trespass to personal property where defendant in his plea merely justified in his own right removing,

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&c. where of he was possessed, plaintiff may reply *de injuria*. † Replication to a plea of *liberum tenementum*, ‡ that the place in question was the soil of the plaintiff, and not of the defendant is good.

The 22 and 23 Car. 2. does not apply to trespass to a mere personal chattel.

1. CLEGG v. MOLINEUX. M. T. 1792. K. B. Doug. 779.

In an action of trespass *quare clausum fregit*, it was stated in the first count, that the defendants broke and entered the close of the plaintiffs, and the grass of the plaintiffs there then growing, with their feet in walking, trod down, spoiled, and consumed; and dug up and got divers large quantities of turf, peat, sods, heath, stones, soil, and earth of the plaintiffs, in and upon the place in which, &c., and took and carried away the same, and converted and disposed of the same to their own use. There was another count upon a similar trespass in another close. The defendants pleaded the general issue to the whole declaration, and two special pleas to the second count; and on the trial a verdict was found for the plaintiffs on the general issue with 1s. damages, and for the defendants on the special pleas; and the judge had not certified. It was holden that the plaintiffs were not entitled to any more costs than damages. Lord Mansfield, J. C., observed: What has been called an *asportavit* in this declaration is a mode, or qualification, to the injury done to the land. The trespass is laid to have been committed on the land by digging, &c., and the *asportavit* as part of the act; and, on the trial of the issue, the freehold certainly might have come in question. This is clearly distinguishable from an *asportavit* of personal property, where the freehold cannot come in question, and which therefore is not within the act. Thus, after trees are cut down, and thereby severed from the freehold, if a trespasser comes and carries them away, that case is not within the statute, because the freehold cannot come in question; here it might.

to the freehold, or to any thing growing upon or affixed to the freehold; consequently, if it appear on the face of pleadings that the title of the land did come in question, it will supersede the necessity of a judge's certificate; 1 Ld. Raym. 76; 2 Salk. 665. Nor where an injury to personal property is laid in the same declaration with assault and battery or a local trespass; therefore, in these cases, though the damages be under forty shillings, the plaintiff is entitled to full costs without a certificate; but then it must be a distinct substantive and independent injury; for where it is laid and proved merely in aggravation of damages, as a mode or qualification of the trespass, on there is a verdict for the defendant upon that part of the declaration which charges him with an injury to a personal chattel, it is within the statute, Doug. 782; 2 Vent. 180; and a certificate is requisite to entitle the plaintiffs to full costs, as trespass for throwing stones, &c. at the windows belonging to the plaintiff's dwelling-house, and breaking the glass, &c.; if he recover less than forty-shillings he is entitled to no more costs than damages, unless the judge certify that the title to the house came in question; 6 T. R. 281.

It has been decided in several cases that, if the defendant in an action of trespass *quare clausum fregit* plead a licence or other justification, which does not make title to the land, and it is found against him, the plaintiff is entitled to full costs, though he do not recover forty shillings damages. The principle on which these determinations have proceeded is, that where the case is such that the judge who tries the cause cannot in any view of it grant a certificate, it is considered to be a case out of the statute; Doug. 884; 7 T. R. 660. So, if the defendant pleads "not guilty" and a justification of a right of way, and the plaintiff traverses the latter plea, and new assign extra viam, and there be a verdict for the plaintiff, with one shilling damages on the new assignment, and for the defendant on the justification, the plaintiff is entitled to full costs, after deducting the defendant's costs on the issue found for him; 1 East, 350. When a cause is originally instituted in an inferior court, and subsequently removed into the King's Bench or Common Pleas, the plaintiff will be entitled to full costs without a certificate, 4 Mod. 378; so on writs of inquiry, Bull. N. P. 329; but under this act an award of an arbitrator is not tantamount to a judge's certificate. By the stat. 8 & 9 W. 3. c. 11. it is enacted, "That in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover not only his damages, but his full costs of suit, any former law to the contrary notwithstanding." Every trespass is considered wilful where the defendant has notice, and is specially forewarned not to come on the land; and every trespass is malicious, though the damage may not amount to forty shillings, where the intention of the defendant plainly appears to have been to harass and distress the plaintiff, 6 T. R. 11; East, 495. The stat. 4 & 5 W. & M. c. 23. s. 10. gives full costs against an inferior tradesman, apprentice, or other dissolute person, who is found guilty of a trespass in hawking, hunting, fishing, or fowling, upon another's land. If a person is an inferior tradesman, it matters not what qualification he may have in point of estate, but if he be guilty of such trespass, he will be liable to pay full costs. In a modern case, the judges were divided in opinion upon a question whether a surgeon and apothecary should be considered as an inferior tradesman; Doug. 386.

2. **STEAD V. GAMBLE.** T. T. 1807. K. B. 7 East, 325.

To trespass at A., and throwing down, burning, and totally destroying the plaintiff's hedge there then erected, &c., whereby, &c. The defendant pleaded the general issue, and justified as to throwing down the hedge, because it was erected on a common over which he prescribed for right of common; whereon issue was taken, and found for the defendant, and a verdict for the plaintiff, with 20s. damages, on the general issue. It was holden, that the facts stated in the special plea, and found, could not be taken into consideration to show that the title to the freehold could not come in question; and as on the declaration the freehold might have come in question, and the judge did not certify, the plaintiff was entitled to no more costs than damages.

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But if it appear on the face of the declaration that the freehold might have come in question, it is sufficient to bring the case within the statute.  
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**Tread-mill.\***

**Trespass for Mesne Profits.** See *ante*, tit. *Mesne Profits*.

**Trial.**

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\*The statutes 19 Car. 2. c. 4. and 31 Geo. 3. c. 64. require justices to provide a stock of materials for the employment of prisoners committed to goal for trial, and having no means of supporting themselves in the mean time; and the 4 Geo. 3. c. 64. authorizes justices to set such prisoners to work with their own consent, in order to maintain themselves; where, therefore, a visiting magistrate reported to the justices at quarter sessions as an abuse that untried prisoners had been compelled to work on a machine called a tread-mill, contrary to their own inclinations, and the justices at the sessions thereupon ordered that such mode of employment should be applied to other prisoners as well as those sentenced to hard labour, and those committed for trial who were able to work, and had the means of employment offered them, by which they might have earned their support, but who refused to work, should be allowed bread and water only; held, that a writ of mandamus would not lie to compel the justices to order such prisoners any other food, and that by ordering even an allowance of bread and water, they had done more than by law they were required to do; *Rex v. North Riding of Yorkshire*, 3 D. & R. 654; S. C. 3 B. & C. 762.

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### I. RELATIVE TO CIVIL PROCEEDINGS.

#### (A) AT BAR.

(a) *In what cases it will, or will not, be granted.*

1. *REX v. HALES.* M. T. 1728. K. B. 2 Stra. 816.

The Attorney-General may, when the crown is concerned, demand a trial at bar.

Information for taking 3s. 4d. for registering a warrant of an attorney contrary to the lottery-act, which says, it shall be entered without fee or reward. and all persons offending shall be incapable to hold any place. The defendants moved that they might have a trial at the bar; for, though the question seemed very short, whether they took the fee or not, the consequence was very considerable. The defendants are auditors for life, and that is a freehold of which they will be divested by a conviction upon this information.

*Per Cur.* In Pasch. 9 Anne, *Regina v. Harcourt*, *scire facias* to repeal letters patent, and there a trial at bar was had, Sid. 420. The crown, it is true, may sue any where; and the Attorney General may, when the crown is concerned, demand a trial at bar.

2. *REX v. THE BURGESSES OF CAERMARTHEN.* 1753. K. B. Sayer, 79.

*Per Cur.* In granting trials at bar, we exercise a discretionary power.

3. *REX v. AMERY.* T. T. 1784. K. B. 1 T. R. 363.

In other cases the Court possesses and exercises a discretionary power; According to the circumstances of each peculiar case.

A rule was made absolute, no cause being shown; on a motion for leave to enter a suggestion on the record in this action, "that the corporation and citizens of Chester were interested in the event of this suit, and therefore that a fair and impartial trial could not be had in the county of the city of Chester." Motion was then made for a trial at the bar of this court. The Court refused it, saying it depended on the particular circumstances.

\* And even if the parties consent, such a mode of trial cannot be had without leave of the Court; 2 Lit. P. R. 608; 1 Stra. 698. The grounds on which this trial ought to be granted are the great value of the subject matter in question, the probable length of the inquiry, and the likelihood that difficulties may arise in the course of it; per Kenyon, arg. Doug. 437; and see 1 Durn. & East, 363. In ejectment, it is said the rule has been not to allow



(b) *Motion for.*

1. CASE OF THE BOROUGH OF CHRIST CHURCH. E. T. 1725. K. B. Stra. 696.

Upon a motion for a trial at bar, which was consented to on both sides, it appeared issue was not joined, and the Court refused to grant it, saying it was below the dignity of the Court to do it, till they knew whether the issue joined would be a matter of difficulty or not.

2. LORD BELMONT'S CASE. E. T. 1699. K. B. 2 Salk. 625.

The Attorney-General moved for a trial at bar last paper day in the term in an action against the governor of New-York for the matter done by him as governor, Cowp. 161, and granted because the king defended it.

a trial at bar, except where the yearly value of the land is one hundred pounds, 1 Barnard, K. B. 141; Barnes, 447; but see 1 Stra. 479; and value alone, 2 Salk. 613; Barnes, 447; or the probable length of the inquiry, is not a sufficient ground for it. But difficulty must concur; and in order to obtain it upon that ground, it is not sufficient to state generally in an affidavit, that the cause is expected to be difficult, but the particular difficulty which is expected to arise ought to be pointed out, that the Court may judge whether it be sufficient; Say. Rep. 79; 2 Lit. P. R. 604; 1 Barn. K. B. 141. And in a modern instance the Court refused a trial at bar in ejectment on a mere allegation of length and probable question of difficulty, in a cause respecting a pedigree; Doe, d. Angell, v. Angell, T. 36 Geo. 3, K. B. In the Common Pleas a trial at bar has been granted upon terms, in an action for criminal conversation; Barnes, 438; Car. Pr. C. P. 103; Pr. Reg. 411, S. C. But they refused it in ejectment, on a question of sanity, where it would have occasioned delay, and some of the witnesses were old and infirm, and not able to travel to Westminster; Barnes, 447. So in a cause concerning rights of chase, involving documentary evidence of great length and antiquity, together with much oral testimony, that Court would not grant the plaintiff a trial at bar, a new trial having been recently refused in the King's Bench, where another defendant who had contested the same rights, had obtained a verdict; 1 B. & B. 265; 3 Moore, 582. S. C.

If one of the justices of either bench, or a master in Chancery, be concerned, it is a good cause for a trial at bar, be the value what it may; 1 Sid. 407. And it is said, that such trial was never denied to any officer of the court, nor hardly to any gentleman at the bar; 2 Salk. 651; 6 Mod. 123, S. C.; but see 2 Lit. P. R. 608. The plaintiff may have a trial of this nature, by the favour of the Court, though he sue *in forma pauperis*; 12 Mod. 318; but when the plaintiff is poor, the court will not grant it to the defendant, unless he will agree to take *Nisi Prius* costs if he succeed; and if he fail, to pay bar costs; 2 Salk. 648; Doug. 437; but see 2 Barnard, K. B. 146. In London, it is said a cause cannot be tried at bar by reason of the charter of the citizens, which exempts them from serving upon juries out of the city; 2 Lit. P. R. 607; 2 Salk. 644. (But the great cause of Lockyer against the East India Company was tried at bar (M. 2 Geo. 3,) by a special jury of merchants of London; 2 Salk. 644; 1 Durn. & East, 366. In that case however, the jury consented to be sworn, and waive their privilege; 2 Wills. 136.) And when the cause of action arises in a county palatine, it has been doubted whether the Court can compel the inhabitants of the palatine to attend as jurors; Say. Rep. 47; 1 Darn. & East, 363.

\* Except in ejectment, Say. 155; nor in an issuable term, 1 H. Bl. 211; Fitzg. 267; R. M. 4 A; unless the crown be concerned in interest, R. M. 4 A; or under very particular and pressing circumstances; see 1 Stra. 52. It must be moved for in the term previous to that in which the cause is intended to be tried, Ca. Pr. C. P. 66; R. H. 9 Ann. r. 1; unless the action be for lands in Middlesex, 2 Salk. 649; and it cannot be moved for in the last paper day of the term. The motion is for a rule *nisi* only; and, in ordinary cases, must be supported by an affidavit stating the value of the matter in question,

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The motion cannot be successfully made until after issue joined.\* It may be made on the last paper day of the term where the crown is concerned.

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The trial is  
by a jury of  
the county  
in which  
the venue  
is laid.†

(c) *Notice of trial.\**

(d) *Entering cause for.* See ante, div. (c)

(e) *Of the jury.*

ANON. M. T. 1769. K. B., 2 Doug. 437.

The Court said: 'Trial at bar ought to be by a jury of the county in which the venue is laid.

(f) *Of the trial.†*

(g) *Of the costs.* See ante, div. (a)

the difficulties likely to arise in the cause, and showing that the inquiry is likely to be of considerable length.

\* Formerly there was no other notice given of such trial in the King's Bench than the rule in the office; but now, it is said there must be fifteen days' notice, 2 Salk. 49; (but see Imp. K. B. 391; where it is said, that now there must be the same notice of trials at bar as in other cases.) The plaintiff, however, as in other cases, may countermand his notice, and prevent the cause from being tried at the day appointed by the Court, R. M. 4 Ann. K. B.; Imp. C. P. 392; and it is said that a second rule cannot be made for a trial at bar between the same parties in the same term, Fitzgib. 267; previously to giving notice, the day appointed for the trial must be entered with the clerk of the papers, in the King's Bench, 2 Lit. P. R. 608; and before the trial a copy of the issue must be left with him, in order that he may take four copies of it, which he delivers to the judges, Imp. K. B. 391; and in that court a trial at bar could not formerly have been on a Saturday, or the last paper day in term, except in the King's case; 2 Salk. 625. In the Common Pleas it is a rule, that the plaintiff's attorney must, before the essoign day of the term in which the cause is appointed to be tried, give notice to the chief prothonotary, or his secondary, of the day of trial, that the same may be put down in the court book provided for that purpose; and in case of neglect the cause shall not be tried that term without motion, and the special direction of the Court; R. H. 9 Ann. reg. 1. C. P. And in that court, the chief justice and the rest of the judges shall respectively have copies of the issue in the cause delivered to them four days before the time appointed for trial; R. M. 3 Geo. 2, reg. 1, C. P.

† In the same manner it would have been if tried at Nisi Prius, unless the parties consent to the contrary, 1 Burr. 292; 2 Doug. 437; the jury is almost invariably special; and the rule for the special jury forms a part of the rule for the trial at bar. When a trial at bar is granted in a penal action, upon motion of the Attorney General, it must be noted on the back of the jury process; 18 Eliz. c. 5, s. 2. If, when the trial is called on, a sufficient number of jurors do not attend, the trial must be adjourned, and a *decem* or *octo tales* awarded, as at common law, 1 Burr. 273; 2 Saund. 349, a; for the stat. 6 Geo. 4, c. 60, s. 37, which allows the *tales de circumstantibus*, is expressly confined to trials at Nisi Prius and the assizes.

‡ In the King's Bench it is the secondary's duty to call over and swear the jury, and record the verdict, whether taken in court or in private after the court is adjourned; of the clerk of the rules to mark all deeds and papers given in evidence, and to have the custody of them after the trial till called for; and of the clerk of the papers to read the record and the written evidence; from a MS. note in the late Mr. Card's book, at the rule office. In the Common Pleas, it is the duty of the secondaries to copy the issues for the judges, and deliver four copies thereof, to call the jury and the defendant, to read the record and all written evidence, and to record the verdict. After a trial at bar, if either party be dissatisfied with the verdict, he may move for a new trial, as in other cases; Sty. Rep. 462, 466; 1 P. Wms. 212; 2 Lord Raym. 1358; 1 Str. 584. 2 C.; 2 Str. 1105; 2 Atk. 320; 1 Burr. 395. S. P. 1.

(B) AT NISI PRIUS.

[ 156 ]

(a) *What causes may be tried at.\**

(b) *Notice of trial.*

1st. *In what cases.*

1. *IFIELD V. WEEKS.* E. T. 1798. C. P. 1 H. Bl. 222. *MONK V. WADE.* T. T. 1788. K. B. 8 T. R. 246. n.

Rule to show cause why the prothonotary should not review his taxation of costs on the following circumstances:—In Michaelmas term last, a rule for judgment as in case of a nonsuit was obtained by the defendants, the plaintiff not having proceeded to trial at the assizes at Gloucester, according to a peremptory undertaking. On taxing the costs, the prothonotary refused to allow the expenses which the defendant had incurred in attending at the assizes, subpœnaing witnesses, seeing counsel, &c. in expectation that the plaintiff would try the cause; and the reason of this refusal was, that no notice of trial had been given. The Court refused the rule, saying it was the settled practice that, notwithstanding a peremptory undertaking to try, it was necessary to give notice of trial, without which the defendant was not bound to take the steps which he had taken in this case.

*See Jacks v. Mayer, 3 Term Rep. 245.*

2. *ELLIS V. TRUSLER.* H. T. 1771. C. P. 2 Blac. 798.

The trial in this cause had been put off last term, on the motion of the defendant, to the first sittings in this term; and counsel for the plaintiff, who had given no fresh notice of proceeding to trial, now moved to put it off till the sittings after term. The Court granted the rule but doubted the necessity of the motion, it being certified by the secondaries that notice of trial must be given by the plaintiff, notwithstanding a special day is fixed by rule of Court.

2d. *What notice necessary.*

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1. *BATES V. BETTIPHER.* M. T. 1733. K. B. 2 Stra. 954. 1216.

The defendant lived at Aylesbury, and not having fourteen days' notice of trial moved to set aside the verdict upon an affidavit that it measured forty-two miles from London, and paid for so many post. On the part of the plaintiff, it was sworn that it was computed to be but thirty-three miles.

*Per Cur.* We must go by the usual computation; our rule was more ancient than these post miles, and consequently respected the computation before the erection of post miles. It was therefore held that the notice was good.

\* Trials by the country are at bar or Nisi Prius. Causes in general are tried at Nisi Prius; trials at bar only allowed in causes which require great examination; 2 Salk. 648. In the Common Pleas, a writ of right may, it seems, be tried at Nisi Prius, 2 Saund. 45. e. f.; 1 Taunt. 415; but if the *mise* be joined thereon, it must be tried by the grand assize, and the Court will not permit it to be tried by a jury instead of the grand assize, though both parties desire it; 1 Bos. and Pul. 192. And if the Nisi Prius clause be omitted in the writ of summons, and the knights come from a distant county and appear at bar, the Court of Common Pleas will not compel them to be sworn unless the demandant will undertake to pay their expenses; 1 Taunt. 415. The statute of Nisi Prius extending only to the Courts of King's Bench and Common Pleas, whenever an issue is joined in the Exchequer to be tried in the country, there is a particular commission authorising the judges of the assize to try it; Bul. Ni. Pri. 804.

† Or, although the cause be made a *remanet* from one assize to another, 4 Bing. 414; but if made a *remanet* from one sittings to another, in town a new notice is not necessary; 8 T. R. 245. If no notice of trial be given, and the plaintiff proceed to trial, and have a verdict, the Court, upon application, will set it aside.

‡ When the trial is to be had in London, and notice is given for the sittings in term, or for the first day of the sittings after term, it must be an eight or fourteen days notice as in Middlesex. But if the notice be given for the adjournment day, it will be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant reside above forty miles from London; and four days before the said first day, if the defendant reside within that distance; R. H. 32 Geo. 3. And the notice, if for the sittings in London after term, must specify whether the plaintiff intends to try at the first day of the sittings after term, or at the adjournment day; Id. When the trial is to be had at the assizes, ten days notice of trial must be given; 14 Geo. 2. c. 17. s. 4.

And where several defendants, if any one reside within forty miles, eight days' notice must then be given.  
But if all defendants reside above forty miles, fourteen days' notice must then be given.

2. **PERRY v. JACKSON.** H. T. 1792. K. B. 4 T. R. 520.

*Per Ashhurst, J.* In construing the act of parliament, 14 Geo. 2, c. 27, requires ten days' notice of trial where the defendant resides above forty miles from London, we have determined that if one of the defendants reside within that distance, so long a notice is not necessary.

3. **BOWLER v. JENKINS.** H. T. 1741. C. P. Barnes, 305.

Defendant lived above forty miles from London; the plaintiff proceeded to trial at a sitting there, upon ten days' notice; defence was made; and defendant, insisting that he was entitled to fourteen days' notice of trial, moved to set aside the verdict, and had a rule to show cause, which was made absolute. By the act 14 Geo. 2, no cause is to be tried in London or Middlesex, where defendant resides above forty miles from London or Westminster, unless notice in writing be given at least ten days before such intended trial. Before this act fourteen days' notice was the settled practice; and, unless necessitated, the Court will not be bound by an act made to take away a benefit from defendants. The practice or law of the court cannot be taken away but by negative words; i. e. there shall be no more than ten days' notice. Fourteen days' notice, notwithstanding this act, are still necessary.

3d. *When to be given.* †

4th. *To whom.*

1. **HARDING v. STAFFORD.** E. T. 1754. K. B. Sayer, 133.

*Per Cur.* Notice of trial ought to be served on the defendant if he appear in person; if he appear by attorney, it should be on his solicitor.

2. **WHITEHEAD v. BARBER.** H. T. 1719. K. B. 1 Stra. 248.

*Per Cur.* Upon conference with the other Courts, they and we are of opinion that, within the reason of 4 & 5 W. & M. c. 21. which appoints that the delivery of a declaration against a prisoner to the gaoler shall be good, a notice of trial to him is good also, though the defendant has an attorney in one case and not in the other.

5th. *Form of.*

**ANON.** E. T. 1791. C. P. Ca. Prac. 3.

It was ordered by the Court upon a motion that all notices of trial, and of inquiries and countermands of notices, ought to be in writing, and that all verbal notices were void.

\* And even where the defendant resided in India, a verdict for the plaintiff was set aside because fourteen day's notice was not given, 4 T. R. 552; and the same where the defendant resided in Ireland; Barnes, 297; Taunt. 458. The master of a coasting vessel, who has no permanent residence on shore, is deemed to be resident at the port to which his ship belongs; and if that be distant above forty miles from London, he will be entitled to fourteen day's notice; 2 Marsh, 151; 6 Taunt. 458. So, if the defendant reside within forty miles of London at the commencement of the action, but afterwards, and before notice of trial given, change his residence permanently to a place beyond that distance, he will be entitled to fourteen days notice, 1 East. 688; 2 W. Bl. 1205. if he have apprized the plaintiff of his removal; 12 East. 427. And on the other hand, if he reside above forty miles from London, he will be entitled to fourteen day's notice, if he may happen to be in London when the notice is served, 2 Marsh, 151. Sunday is reckoned as one of the days, unless it be the day on which the notice is given; R. M. 4. A.

† The plaintiff, by the practice of this Court, is bound to give notice of trial to the defendant in town causes during the term next after that in which issue is joined, in country causes, for the second assizes after the term in which issue is joined; he may do it sooner if he will; but he must do it within the time specified; otherwise the defendant may proceed to trial by proviso, or apply for judgment as in case of a nonsuit.

‡ In country causes, the notice of trial in the King's Bench should be given to the agent in town; 3 East, 568. But in the Common Pleas, it seems that it may be given either to the agent in town, or to the attorney in the country. Barnes, 306; but see *Id.* 298; Cas. Pr. C. P. 130. S. C.; *semb. contra*, except where it is given on the back of the issue, in which case, as the issue must be delivered, Cas. Pr. C. P. 94; so the notice of trial must necessarily be given to the agent in town. In the Exchequer, all notices of trial given by the attorneys or side clerks of the office of pleas in causes instituted there, are required to be entered in the book of orders kept in such office, and written notices of such entries left at the seat in the said office of the attorney or clerk in court concerned for the defendant, or at his chambers or place of residence; R. H. 39 Geo. 3. in Seacc. Man. Ex. Append. 223. 224. 228; Price, 503.

§ And served before nine o'clock at night; R. E. 10 Geo. 2. In ordinary cases it is

6th. By continuance.\*

1. CHANKLIN v. ANSON. E. T. 1734. C. P. Barnes, 298; 2 Stra. 1219. This notice should be served two days prior to the sitting at which the cause is to be tried; This action was laid in Cornwall. Notice of trial was given in town, and countermanded in the county three days before the commission day of the assizes. The question was, whether this was a good countermand to prevent costs for not proceeding to trial, defendant having sent a witness from London, who had got as far as Exeter before he heard of the countermand.

*Per Cur.* The countermand would have been good if given but two days before the commission day.

2. BOYES v. TWIST. T. T. 1732. C. P. Barnes, 292; 2 Stra. 1219. [ 160 ]

Notice of trial for the last sitting within Easter term was continued till the sitting after that term, and afterwards continued till the first sitting within this term. Defendant urged that the notice could not be regularly continued a second time, and having no defence, moved for a new trial, and obtained a rule nisi upon showing cause. The Court was of opinion, that plaintiff cannot continue his notice a second time; that is, he shall give short notice but once; but this notice is objected to only because it is a continuance; the full time is given by it; and had the word continue been out, defendant agrees the notice would be good: that word shall not vitiate the notice, the full time being given, especially as it is sworn by Jones (plaintiff's attorney) that Townsend (defendant's attorney) requested him after last term to continue the notice to this term. And can only be given once.

7th. Of term's notice.

1. LAZIER v. DYER. M. T. 1703. K. B. 2 Salk. 457; 1 Stra. 653.

Issue being joined and entered as of Trinity term, the plaintiff rested till the Trinity term following, and then gave notice of trial after the term; and the *venire facias* and *distringas* were taken out in the vacation, but tested and entered as of the term. And *Per Cur.* This is not sufficient notice; for though in law this was a proceeding within the term, yet in fact it was a proceeding in vacation, and, therefore, there was not a term's notice of trial.

When is sue has been joined above four terms a term's notice of trial must be given. usually written on the back of the issue; but it may be written on a separate paper, and is so of course in all cases of notices of trial by continuance, new notices, &c. And by R. T. 2 Geo. 1. reciting that in divers actions and suits commenced in this court, the plaintiff many times in pleading concludes to the country, and the defendant not being obliged to join issue or demur until a four-day is expired, plaintiffs are thereby greatly delayed in trying their causes; for the prevention of which, for the future, it is ordered that in all cases where the plaintiff concludes to the country, the defendant's attorney shall be bound to accept notice of trial upon the back of such pleading, whether the same be delivered to the defendant's attorney or agent, or left in the proper office, where the same may be left by the course of the court, and such notice of trial so given shall be as good and effectual as if issue had been actually joined. If the notice be indorsed on the issue, it need not, of course, be intitled, nor need it be so particular as when written on a separate paper, where the notice indorsed on the issue was, "Take notice of trial at the next assizes," without mention of date, county, or attorney's name, yet the Court held it sufficient, although it would have been clearly bad if written on a separate paper; 2 Stra. 1237; see also 2 W. Bl. 1298. If the notice be irregular or insufficient, and the plaintiff obtain a verdict, the Court upon application will set the verdict aside.

\* When notice of trial in London or Middlesex has been given, and the plaintiff is not ready to proceed, then, instead of countermanding his notice, he may continue it to the next sitting, by giving a notice by continuance; R. M. 1654. T. 21. A notice by continuance, being nothing else in effect than a short notice of trial, is never adopted where there is time to countermand the former notice and give a new one, and consequently never used, nor indeed can it be given in country causes. It cannot be given after the plaintiff has countermanded his notice of trial; Barnes, 301. Also, if the original notice were void, the notice of continuance will be void also; yet in such a case, if such a time intervene between the service of the notice by continuance, and the sittings to which the original notice is thereby continued, as would be sufficient to give a notice of trial, the Court will deem such notice an original or new notice of trial, and valid; Barner, 292; 2 W. Bl. 1298.

† Which notice must be given before the assign day of the fifth, or other subsequent term; 1 Str. 211; 2 Str. 1164; K. B. Pr. Reg. 391; Barnes, 291; 26 and 27 Geo. 2. s. 5. in Scac. Mas. Ex. Append. 211, 212. And a judge's or baron's summons, if no order has been made upon it, is not a proceeding within the meaning of this rule. R. E. 13 Geo. 2 C. P.; nor the suing out of a *venire facias* or *distringas*, in the vacation of the fourth term, though it be tested and entered as of that term; 2 Salk. 457. 650. But a

2. **HATCHELL v. GRIFFITHS.** M. T. 1695. K. B. 2 Salk. 644. **GREEN v. GAUNTLETT.** M. T. 1722. K. B. 1 Stra. 531.

So, in K. B. where joined a bene a year.

Issue was joined in Trinity term 1695, and notice then given for trial next assizes, but no farther nor other proceeding till Trinity vacation 1696, and then the plaintiff gave a new notice of trial, viz. fourteen days' notice for next assizes, when he accordingly tried the cause and had a verdict; but because there was no proceeding within a year after the first notice, it was set aside; *sed nota*, notice within the term had been a proceeding within the year, and made notice for fourteen days good notice of trial.

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8th. *Of countermand.*

**TASHBURN v. HAVELOCK.** M. T. 1742. C. P. Barnes, 306; 2 Stra. 1073.

Notice of countermand\* may be served on the attorney in the country or agent in London. In country causes short notice of trial must be at least four days before the commission day.†

Notice of trial on an old issue was given to the attorney in the country, and not to the agent in town; the question was, whether it was good notice or not? *Per Cur.* The notice on this old issue is well given to the attorney in the country, or it may be given either to attorney or agent; but, where notice of trial is given on the issue book, it must be given to the agent, because the issue can be delivered no where but in town. Notices of trial and countermands, notices of executing writs of inquiry and countermands, may be given either to the attorney in the country or the agent in town.

9th. *Of new offices.*†

10th. *Of short notices.*

**REG. GEN.** E. T. 1790. K. B. 3 T. R. 660.

It is ordered, that from and after the last day of this term, where short notice of trial is to be accepted in country causes, such notice shall be given at least four days before the commission day, one day exclusive and the other inclusive.

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11th. *Of not proceeding according to.*

judge's order or notice of trial, though countermanded, *Pr. Reg.* 391, 392; Barnes, 304; S. C. R. E. 13 Geo. 2. C. P. 1 Str. 531; R. T. 26 and 27 Geo. 2. in *Seac. Man. Ex. Append.* 211. 212; or notice that the plaintiff will proceed in the cause, which has not been acted under, is such a proceeding as will prevent the necessity of giving a term's notice; 3 East. 1. The rule requiring a term's notice does not extend to a trial by proviso; 2 B. & A. 594; 1 Chit. Rep. 317. S. C.; or a motion for judgment as in case of a nonsuit, *Id.* *ibid.* 5 Durn. & East, 634; Barnes, 308; 2 Blac. Rep. 1223; and being confined to voluntary delays, it does not apply, when the cause has been stayed by injunction or privilege, 1 Sid. 92; R. M. 4 Ann. K. B. Doug. 71; 2 Blac. Rep. 784, or when there has been an agreement to stay proceedings for a limited time, to enable the defendant to pay the debt, in default of which the plaintiff is to be at liberty to proceed; 2 Bunb. 60; 2 Blac. Rep. 762.

\* The plaintiff has a liberty of countermanding his notice of trial, even in a case of a trial at bar; R. M. 4. A. The notice for this purpose must be in writing; *Id.* In town causes, where the defendant resides within forty miles of London, two day's notice of countermand is sufficient; R. M. 3 Geo. 1. But if the defendant reside at a distance of more than forty miles, six day's notice is necessary; 14 Geo. 2. c. 17. In country causes, notice of countermand must be given six days before the commission day; 14 Geo. 2. c. 17. The days in all these cases are reckoned, the one inclusive, the other exclusive. Notice of countermand cannot be given on a Sunday; R. M. 3. Geo. 1. If the plaintiff do not countermand his notice in time, and do not proceed to trial according to his notice, the defendant shall be entitled to his costs of the day, and may move for judgment as in case of a nonsuit.

† In all cases where the notice already given is not available, and the plaintiff cannot continue it, he must give a new notice of trial, if a notice be at all necessary; R. M. 4 Ann. 8 T. R. 245.

‡ In town causes two days' notice seems to be sufficient, *Pr. Reg.* 396. 444; Barnes, 301. S. C.; but it is usual to give as much more as the time will admit of; and if the defendant be under terms to take short notice of trial for the last sittings in term, and no notice be given for those sittings, he is not obliged to take short notice for the sittings after term; *Isaacs v. Windsor*, T. 24 Geo. 3. K. B. So, in the Common Pleas, an undertaking to accept short notice of the trial for the sittings after term, given when there is not time for short notice of trial at the sittings, does not compel the defendant to accept short notice of trial at the adjourned sittings; 7 Taunt. 452; 1 Moore, 160. S. C. Sunday is so accounted a day in these notices, unless it be the day on which the notice is given; R. M. 4 Ann. K. B. 8 Mod. 21; and see R. M. 3 Geo. 1 C. P. Cas. Pr. C. P. 15.

1. **WHITLOCK v. HUMPHREYS.** M. T. 1729. K. B. 2 Stra. 349.

Upon debate it was settled that, to save costs for not going to trial, it would be sufficient to countermand notice in a town cause two days, and in a country cause four days, before the assizes; and that it should be a general rule without considering the charges or inconveniences in any particular case.

2. **HOLDING v. SMITH.** M. T. 1826. K. B. 5 B. & A. 531.

In a case in which a corporation were defendants the record is withdrawn in consequence of the absence of a material witness, who is one of the corporation, and it does not appear that such absence arises from the act of, or in collusion with, the other corporators, the prosecutor will be compelled to pay the costs of not proceeding to trial pursuant to notice.

(c) *Order in which the causes are to be tried.*†

(d) *Of the jury.* See *ante*, vol. xi. p. 725.

(e) *Of the stating the case and evidence.*

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**HODGES v. HOLDER.** 1813. 3 Campb. 366; 2 Stark. 518.

To a declaration in trespass, the defendant pleaded, as to coming with force and arms, and whatever else was against the peace of our lord the King, not guilty, and as to the residue of the trespasses a right of way.

Bayley, J., held, that the defendant should begin, because the first part of the plea was not a general issue, and did not throw the necessity of any proof upon the plaintiff.

The defendant must begin where his plea does not amount to the general issue.†

\* Even although he have prevented the plaintiff from entering his cause for trial by entering a *ne recipiatur* with the marshal; Pr. Reg. 406. In like manner, the plaintiff is entitled to costs if the defendant do not proceed to a trial by a proviso, after giving notice to that effect, 2 Str. 797; and if both parties give notice of trial, and neither of them countermand their notice, or proceed to trial in pursuance of it, each of them is entitled to costs from the other; Pr. Reg. 405; 4 Taunt. 591. Also, if the plaintiff do not proceed to execute his writ of inquiry in pursuance of his notice, or countermand it at the time, the defendant will be entitled to his costs in the same manner as for not proceeding to trial; 1 Str. 317; 2 Str. 728. In this court the defendant may move for costs for not proceeding to trial and judgment as in case of a nonsuit in the same term, or even at the same time, 4 B. & C. 260; in the Court of Common Pleas it is otherwise, 1 B. & P. 39; 1 Sellow, 372; Taunt. 591; 7 Id. 476; nor can he, it seems, in the Common Pleas, move for these costs after moving for judgment as in the case of a nonsuit, Hullock, Costs, 404; Tidd. 689; 2 W. Bl. 1093; at least if the rule for judgment as in case of a nonsuit have been made absolute, because the judgment of nonsuit includes these costs. But, after moving for costs for not proceeding to trial, the defendant, it would seem, may move for judgment as in case of a nonsuit; Tidd. 689. If the plaintiff be an executor, he is liable for those costs for not proceeding to trial in the same manner as if he was suing in his own right. To obtain such costs the defendant's attorney makes an affidavit stating when the action was commenced, issue joined, and notice of trial given, and that the plaintiff did not proceed to trial or countermand the notice. By R. M. 1654. the defendant is entitled to costs if the plaintiff do not proceed to trial in pursuance of his notice, unless the plaintiff have countermanded his notice, or show cause to be allowed in the court in excuse of such costs. And the Court of Common Pleas refused the rule where the plaintiff was prevented from going to trial by an accident which happened to a material witness; Barnes, 133. As the rule, however, is absolute in the first instance, the only way of bringing the matter of excuse under the consideration of the court, is by moving to discharge the rule.

† At *Nisi Prius* every cause shall be tried in the order in which it has been entered, without preference or delay, unless it shall be made out to the satisfaction of the judge in the open court that it is impracticable or inconvenient so to do, who thereupon may make such order for the trial of the cause so put off as to him shall seem just, R. H. 14 Geo. 2; as to putting off the trial generally, see post div. E. If the cause be coming on, and you are not prepared to proceed in the trial, you may withdraw the record; see *ante*, tit. Record, Withdrawing of. In town causes the special jury causes are always deferred until the sittings after term, after the common jury causes have been disposed of. Where a rule for a special jury, however, has been obtained merely for delay, the Court, upon application, may order it to be tried at some of the sittings in term; 4 Taunt. 470. When the cause is called on, the record, or abstract of it made out by the judge's marshal, is handed to the judge in order that he may know the issues the jury have to try.

‡ It has been laid down as a general rule that the party who has to maintain the affirmative of the issue must begin the evidence where there are special pleadings; or, where a special defence is not intended to be given in evidence under the general issue, it may perhaps be more accurate to say that the party who has added the similiter shall begin; if both parties, however, have added the similiter to different sets of pleadings in the same cause, then the plaintiff shall begin. Where a special defence is intended to be given in

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(f) *Of the defence, &c.\**(g) *Of the reply.*

REX v. BIGNOLD. M. T. 1821. K. B. 4 D. &amp; R. 70.

Where the defendant's counsel has introduced any new fact, the plaintiff's counsel has a right to reply.†

After the case for the prosecution was closed, the defendant's counsel proceeded to address the jury, and in the course of his address read some resolutions passed at a meeting of the proprietors of an insurance institution with which the defendant was connected, and stated certain facts which he conceived to be material to explain the defendant's conduct in the transaction out of which the prosecution arose, but upon after consideration he declined producing the resolutions in evidence, or calling witnesses to establish the facts which had opened, whereupon the counsel for the prosecution claimed the right to reply upon the case so opened.

The Lord Chief Justice held, that the counsel of the prosecutor had a general right to reply upon the defence which had been opened, although the facts and circumstances stated had not been established in evidence. The due administration of justice required that such privilege should be allowed, because the statement of facts and circumstances unsupported by evidence could not but have an effect upon the minds of the jury; he should lay down as a general rule, that, where counsel for a defendant open facts upon the merits of the case, and declines calling witnesses to prove those facts, the counsel for the prosecution shall be entitled to a general reply. The counsel for the prosecution replied accordingly, and the defendant was found guilty.

evidence under the general issue, that party shall begin who would have been entitled to do so if the defence had been specially pleaded. Where there is a justification pleaded to a libel, without the general issue, the defendant is entitled to begin; *Cooper v. Wakely*, 3 C. & P. 474. The junior counsel for the party who has to begin, opens the pleadings, that is, states shortly the substance of them to the jury, and the points upon which the issue has been joined. The senior counsel on the same side then states the facts and circumstances of the case to the jury, the substance of the evidence he has to adduce, and its effects in proving the case stated, and remarks upon any point of law on which, together with the matters of fact, the jury will have to found their verdict, 4 Esp. 136; he also states the matter of defence, if it appear upon the record, or from a notice of set-off or the like, and the evidence by which he can disprove it. 1 Stark, 439; 2 Id. 31; but where the defence does not appear upon the face of the record in cases from cross-examination of the plaintiff's witnesses, the usual practice now is, not to notice the defence in the opening, but to wait until the defendant has closed his case, and then to call witnesses to disprove it, and to observe upon the defence in the general reply.

After the senior counsel has thus stated the case, the witnesses to prove it are next called and examined in their order; the first is examined by the counsel next in rank to the senior; the second by the junior, if there be three counsel engaged on that side, the third by the senior, each serjeant or barrister examining a witness in the order of his precedence. Whilst a witness, however, is under the examination of a junior counsel, the leading counsel may interpose, take the witness into his own hands, and finish the examination; but after one counsel has brought his examination to a close, no other counsel on the same side can put a question to the witness, 2 Camp. 280; where there are several defendants, who appear by separate attorneys, and have separate counsel, if their defences be different or distinct from each other, the counsel of each have a right to address the jury, and examine witnesses; but if they rely on the same ground of defence, only one counsel can be heard to address the jury, and one counsel only can examine each witness upon the part of all the defendants, in the same manner as if they had appeared and defended jointly; 4 Camp. 174. As to the competency, examination, and cross-examination of witnesses, see tit. Witness.

\* This is done after the plaintiff's counsel have closed their case, by the senior counsel of the opposite party, who then states to the jury the matter of his client's defence, the evidence (if any) which he will adduce in support of it, and remarks on the case and evidence of the other party. The witnesses for the defence (if any) are then examined and cross-examined.

† The opposite party is entitled to the reply as of right, otherwise not, unless when the king is a party, and the privilege of replying is claimed by the attorney-general in right of his office, *Peake*, N. P. Ca. 236; but a defendant's merely giving evidence of payment of money into court under a rule will not entitle the plaintiff to the reply; *R. H.* 50 Geo. 3; 2 Taunt. 267. Before the plaintiff's counsel replies, however, he may, if he think proper, produce evidence to disprove any part of the defence set up by the defendant; in which case the defendant's counsel has the privilege of again addressing the jury, but his observations must be confined to the evidence thus given by the plaintiff. The reply then closes the case on both sides.



(h) *Of the summing up.\**

(i) *Withdrawing a juror.*

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STODHART v. JOHNSON. E. T. 1790. K. B. 3 T. R. 657.

The defendant paid 540l. into court, which the plaintiff did not take, but proceeded to trial, when a juror was withdrawn by consent. And the question was, whether the plaintiff was, or was not, entitled to the costs till the time of paying the money into court. The master having taxed those costs, drawing the Court said, that whenever a juror was withdrawn each party must pay his own costs.

(j) *Bill of exceptions.* See *ante*, tit. Exceptions, Bill of.

(k) *Demurrer to evidence.* See *ante*, tit. Demurrer to Evidence.

(l) *Verdict.* See *post*, tit. Verdict.

(C) BY PROVISO.

WORCESTER CANAL v. TRENT NAVIGATION. E. T. 1815. C. P. 1 Marsh, 218; S. C. 5 Taunt. 577.

This cause had been twice carried down to the assizes for trial, and the plaintiffs were each time nonsuited; but the Court had each time set aside the nonsuit, and granted a new trial, on the ground that the facts were not sufficiently before the Court, and in order that, if necessary, a case might be made for the opinion of the Court previously to the last assizes. The defendants, though there had been no default on the part of the plaintiffs, gave the latter notice that they should take the record down by proviso. The plaintiffs refused to accept this notice: the defendants, however, carried down the record, and the plaintiffs, not appearing, were nonsuited.

Lord Chief Justice Gibbs. I take the general rule to be perfectly established that the defendant cannot carry a cause down by proviso till there has been a default on the part of the plaintiff. The only case in the slightest degree resembling the present is that of *Humpage v. Rowley*, but that would not be applicable to all other cases as much as to this; and, if we were to suffer this nonsuit to stand, any defendant might carry the record down by proviso at any time. It is true that judgment as in case of a nonsuit could have been granted in this case; but it does not follow that the defendant may carry the cause to trial without any default by the plaintiff. The rest of the Court concurring.—Rule absolute.

\* That is, the judge states to the jury the matters really in dispute between the parties; he recapitulates from his notes the evidence given on both sides, and makes his remarks on it when necessary; if any question of law be mixed up with the questions of fact, he states to them the principles of law upon which the case must be decided, and the manner in which they must be applied to, and their effect upon it; and, lastly, he states to them, if necessary, the form in which they are to give their verdict.

† This is usually done at the recommendation of the judge, in cases where it is doubtful whether the action will lie, or where the judge intimates an opinion, that, under the peculiar circumstances of the case, the action should proceed no further.

‡ In all cases where the plaintiff, after issue joined, does not proceed to trial, where, by the course and practice of the Court, he might have done so, the defendant may, if he wish have the action tried by a proviso; that is, he may give the plaintiff notice of trial, make up the *Nisi Prius* record, carry it down, and enter it with the marshal, and proceed in the trial as in ordinary cases. This, however, can be done only in cases where the plaintiff has been guilty of some laches, or default after issue joined, except in replevin, prohibition, *quare impedit*, 2 Salk. 652; and error in fact, 2 Saund. 836. a. In which cases both parties being actors, the defendant may make up the *Nisi Prius* record, and thereupon proceed to trial, although no laches or default be imputable to the plaintiff. The Court have also allowed the defendant to carry down the record of an issue directed by the Court of Chancery to trial by proviso, upon it being suggested to them that the plaintiff wished to delay the cause; 4 T. R. 767. As the delay and expense attending the trial by proviso, however, are material objections to this mode of proceeding, is seldom adopted, unless in cases where the defendant is particularly anxious that the cause should be finally settled by verdict. The defendant, before he can proceed to trial by proviso, must rule the plaintiff to enter the issue, and if the issue be not entered by the plaintiff within the time limited by the rule, the defendant may either sign judgment of *non pros.* or he may himself enter the issue. After the issue has been thus entered either by the plaintiff or defendant, if the plaintiff, in causes in London or Middlesex, make default in trying his issue, or in country causes do not proceed to trial at the next assizes, the defen-

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(D) BY RECORD. See *ante*, tit Record.

(E) OF PUTTING OFF TRIALS.

1. REG. GEN. M. T. 1810. C. P. 2 Taunt. 221.

At Nisi Prius a trial cannot be put off by consent.

The Court desired that it might be understood that they would never hereafter put off the trial of a cause upon the consent of the parties and counsel at the sittings at Nisi Prius, but that the plaintiff must either proceed to try, or must withdraw his record.

SAUNDERS v. PITMAN. M. T. 1800. C. P. 1 B. &amp; P. 33.

And the absence of a material witness is no ground where the

Rule to show cause why the trial in this case should not be put off till next Hilary term, on an affidavit stating that a master of a vessel employed in the Southern Whale Fishery was a material witness in the cause, and that he was expected to return upon Christmas next.

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*Per Cur.* The Court will not in all cases be content with a common affidavit to put off a trial. It must be satisfied that injustice would be done if such an application were refused. Here a poor plaintiff claims a debt; he wants to amend his proceedings by the articles of agreement, and the defendant delays showing them till he is obliged so to do, and in the mean time his witness leaves England. He has therefore brought himself into this difficulty, by endeavouring to take an unfair advantage, and the Court will not consider itself obliged to put off the trial of a cause for the accommodation of the defendant, if the defendant has not conducted himself fairly and candidly, and if he might have had his witness.

defendant may afterwards proceed to trial by proviso, the practice in such cases being to insert the clause of proviso in the jury process; 3 T. R. 661; 1 W. Bl. 375. The defendant must give the plaintiff the same notice of trial that the plaintiff is obliged to give him in ordinary cases, except that it is not necessary to give a term's notice where no proceedings have been had in the cause for four terms, as is the case when the plaintiff takes down the record to trial; 2 B. & A. 594. If both the plaintiff and defendant happen to carry down the record at the same time, the trial shall be by the plaintiff's record, if he enter it with the marshal; but if he omit to do so, the defendant may proceed upon the record brought down by him; R. M. 4 A. But, although the plaintiff have entered his record with the marshal, yet, if he have not given a sufficient notice of trial, his entry will be of no effect; the defendant in that case may proceed to trial upon the record he has taken down, and, if the plaintiff do not appear to it, he must be nonsuited; 1 B. & A. 253. And in all cases where the defendant proceeds upon his record, if the issue happen to be on the plaintiff, who is therefore to begin first, but does not appear, the defendant must not enter upon his proof, and take a verdict; but the proper course is to call the plaintiff and nonsuit him; 1 Wils. 300; Barnes. 458; 2 Saund. 336. b. If, however, instead of doing so, he takes a verdict, the Court will not in general set it aside, except for the purpose of allowing a nonsuit to be entered instead of it; 1 B. & C. 110.

\* Nor where there testimony is to establish an odious defence; Johnson v. Smyth, 1 B. & P. 454. Nor where the case is suspicious, and they are all foreigners resident abroad, and not likely to come over; Rex v. D'Eon, 3 Burr. 1513. But the fact of their departure before action brought is no objection; Loft. 329. But the Court will in general when a material witness for either party is absent, allow the trial to be put off either to another day of the same sittings, or to another sitting in the same term, or to another term, or even for a longer period under particular circumstances. Barnes, 440; to another day of the same sittings or assizes at the instance of either party; to another sittings, term, or assizes at the instance of the defendant only, for a plaintiff may have all the effect of such an application by withdrawing his record; MSS. H. 1826. cor. Abbott, C. J., 3 Campb. 333; 1 Taunt. 565; 2 Taunt. 221. They have put off a trial until a commission should go to examine a material witness abroad, who refused to attend, and until the deposition should be certified; 1 W. Bl. 512. They have refused it, however, in another case, where it did not appear that there was any likelihood of the witness's return, 1 W. Bl. 615; and the same where the witness did not go abroad until after notice of trial was given, and he might consequently, have been served with a subpoena, in a sufficient time. Barnes, 442; and they will also, it seems, refuse it, if the party applying have conducted himself unfairly, or have been the cause of any improper delay; 1 B. & P. 33. They have also refused it upon the application of the plaintiff in a penal action; Tidd. 699. In an action for libel, where a justification was pleaded, the Court, upon the application of the defendant, put off the trial, to enable him to procure the attendance of witnesses from abroad (the nature of the evidence being particularly pointed out by the affidavit), but imposed the terms of his admitting upon the trial the publication of the alleged libel; 4 D. & R. 630. Even where the court had twice before put off the trial, on account of the absence of a material witness on a whaling voyage, and the defendant applied a third time to put

## 3. CALLEAND v. VAUGHAN. H. T. 1801. C. P. 1 B. &amp; P. 210.

Contradictory verdicts have been found on a policy of insurance, and a third action brought against another underwriter. The Court will not put off the trial to enable him to obtain a commission from a court of equity for the examination of witnesses in Scotland to the same facts which were given in evidence on the last trials; at least, if he has obtained time to plead on the usual terms.

opportunity to procure it has been lost by neglect\*

## 4. HAYLEY v. GRANT. M. T. 1752. K. B. Sayer, 63.

In this case it appeared that the attorney for the defendant was too ill to attend the trial of his cause.—The Court put the trial off.

## 5. ANON. E. T. 1811. C. P. 3 Taunt. 315.

Motion for a rule nisi to put off the trial of this cause for the absence of a material witness, who six weeks since went to Morpeth in Northumberland. The notice of trial was given on the 21st of November for the Middlesex sittings after this term. Notice of this motion was given to the opposite party on the night of the 27th. Mansfield, C. J. The intention of the rule of practice is to prevent the time of the judge who sits at Nisi Prius from being occupied with discussing these motions. But, if a rule nisi is granted now, cause must be shown at Nisi Prius, which equally occupies the time of the judge: the having given him notice last night is not sufficient to bring him into court this morning to show cause. You might have made this motion a week since, and then he would have had sufficient time to show cause within the term.—Rule refused.

off the trial, on account of the witness being still absent, the Court granted the application, upon the terms of the defendant's bringing the money into court, or giving security for it to the satisfaction of the master; MSS. E. 1820. So, where the copy of a judicial document in the West Indies was stated to be material and necessary evidence for the defendant, the Court put off the trial to give him time to procure it; 1 D. & R. 159.

\* But a trial on an action against a banker for money paid in was postponed until an indictment against the plaintiff for a theft had been tried, on a surmise that this was the produce of the felony; Deakin v. Praed, 4 Taunt. 825.

† So, where a libel was published immediately before the assizes, with an intent to influence the jury, the Court, upon application put off the trial; 1 Burr. 499. 510. Also, where three actions were brought against three several defendants, for different parts they had taken in the same transaction, in one of which issue was joined on a demurrer, and issues in fact in the other two, the Court upon application of the defendants, put off the trials of the issues in fact until the demurrer should first be argued, as the point of law involved in it was the foundation of the plaintiff's right to damages in the other two actions, 13 East, 27: they have, however, refused to put off the trial until a suit concerning the same matter in the Ecclesiastical Court should be determined, 2 Salk. 646. 649; and they have refused it also where the application was made merely because counsel were not prepared; 3 Burr. 1319. And a judge at Nisi Prius has refused to put off a trial to give the plaintiff an opportunity to amend his declaration, having omitted the profert; 1 Stark. 74. Also, where the defendant was arrested as he was coming to court to attend his cause, the judge at Nisi Prius refused to put off the trial on that account, unless upon payment of costs; 1 Campb. 229. And, lastly, the Court or a judge at Nisi Prius, will put off the trial of an issue out of Chancery, for the same reasons, and under the same circumstances as in ordinary actions; 4 Campb. 163.

‡ The application in term time should be made to the court for a rule nisi in vacation to a judge at chambers, and should it seems, be made at least two days before the day of trial, Barnes, 437, 438. 442. 444; or if the grounds of the application have occurred or become known to the party so recently that he cannot make it in the manner now mentioned, he may apply to the judge at Nisi Prius, who will accordingly put off the trial, if satisfied as to the sufficiency of the grounds stated for the application; R. H. 14 Geo. 2. It may be necessary to add, that a judge sitting at Nisi Prius at Westminster cannot make an order in a cause to be tried in London; 3 Campb. 41. If the application be made at Nisi Prius, notice of the intended application, and a copy of the affidavit on which it is founded, must previously be given to the opposite party, which have the effect of preventing his incurring the expense of bringing up his witnesses, if he do not intend to oppose the application; or, if he do oppose it, it affords him an opportunity of showing cause against it in the first instance. The application must be founded on an affidavit, stating the grounds upon which it is made, if made on account of the absence of a material witness; the affidavit in ordinary cases states the time issue was joined, the time for which notice of trial was given, the absence of the witness, and that the party cannot safely proceed to

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And cannot be made at Nisi Prius when it might have been made at Bank.

The Court in granting new trials exercises a discretionary power.

And to induce it to grant a new trial, it must clearly appear that the jury have given their verdict under a misconception of what they

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As where they came to a conclusion without having a sufficient knowledge of the facts;

6. ANON. E. T. 1810. C. P. 1 Taunt. 565.

The Court desired that, for the future, it may be understood as a general rule of practice, that no motion to put off a trial would be entertained at Nisi Prius, when the motion could be made in Bank in term time.

(F) OF NEW TRIALS.

(a) *When a new trial will, or will not, be allowed.\**1st. *In general.*

1. EDMONSON V. MACHELL. T. T. 1786. K. B. 2 T. R. 4.

Per Ashhurst, J. An application for a new trial is an application to the discretion of the Court, who ought to exercise that discretion in such a manner as will best answer the ends of justice.

2. CARSTAIRS V. STEIN. E. T. 1814. K. B. 4 M. &amp; S. 192.

In this case, the question was, whether a commission of one-half per cent. upon a banking account be usurious or not, is a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expence, or whether it be a colour for the payment of interest above 5l. per cent. upon a loan of money; and, if there be a contrariety of evidence upon that point, the Court will not set aside the verdict and grant a new trial, although the verdict may be against the opinion and direction of the judge who tried it, unless it appears clearly that the jury have drawn an erroneous conclusion.

the law; or have given it, believing what they ought to have discredited, or not recognising ought to have taken into consideration;

3. REX V. BURR. 1807. Ex. 5 Price, 173.

Bill of exchange which had been returned by the holder endorsed by him generally (who had received it of the payee endorsed by him also generally) to the drawers, with other bills and money, in consideration of another draft for the whole amount, and which bill was then remitted by them (the drawers) to a bill broker, under cover, in a letter addressed to one of the firm of a banking-house (who were the drawers, but had not accepted), accompanied with orders to the broker, by the same letter, to get the bill discounted, and to pay over the proceeds to the banking-house, had been seized by a sheriff in possession of the banking-house, &c. under an extent, whose officers received it of the postman at the time of the arrival of the letter in which it was inclosed. The jury found for the Crown. The Court granted a new trial on an objection to a verdict specially found for the Crown under such circumstances, that the facts did not support the affirmative of such an issue, expressing themselves desirous of having before them a fuller state of facts, but giving no opinion on the point of law.

trial without him; the endeavours which have been made to find him, and the time at which he is expected to return; but if the witness be abroad, or if, from the nature of the application, it may be suspected that it is made merely for the purpose of delay, the Court usually require that the affidavit shall state the cause of action and the evidence expected from the witness in order that they may judge if it be material, and that it also state circumstances from which they may infer the probability of the witness's return within a reasonable time; 3 Burr. 1513; 1 W. Bl. 436. 510. In no case, however, is it necessary to state the name of the witness on account of whose absence the party cannot proceed to trial, 2 D. & R. 420; 4 D. & R. 833. Formerly, it seems this affidavit must have been made by the party himself, Barnes, 437; but the affidavit of the attorney in the cause has since been deemed sufficient, Peake, 97; and even the affidavit of the attorney's clerk, if it state that he is particularly acquainted with the circumstances of the cause, and has the management of it; 1 H. Bl. 637. In deciding upon an application of this kind, the Court will not in general enter into any inquiry as to the admissibility of the evidence required; 1 D. & R. 159. When the trial is thus put off, it is usually upon the terms of paying any costs the opposite party may thereby have been put to; and when the plaintiff sued as a pauper, and the defendant had the trial put off upon undertaking to pay the costs of the day the Court of Common Pleas granted an attachment against the defendant for the non payment of these costs; 1 B. & P. 39.

\* If any defect of judgment happen from causes wholly extrinsic, arising from matters foreign to or *dehors* the record, the only remedy the party injured by it has is by application for a new trial. But if any error in the proceedings appear upon the face of the record, the party injured by it has his remedy by demurrer, motion in arrest of judgment, or writ of error, according to circumstances.

4. MOUNTEDGECEMEE v. SYMONS. E. T. 1802. Ex. 1 Price, 278.

Rule nisi for a new trial on the ground that the finding by jury was adverse to the direction of the judge. The judge reported that, on the part of the plaintiff, it was proved that the ancient bed of the water lay between the two estates; the defendant answered that, by proof that the stream had been diverted since the year 1790, and proved that he used to work a lead-mine till 1803, when the work ceased; and that, as soon as the mine was re-opened, he again employed the water as before. The judge then observed that, during the trial, his inclination was in favour of the defendant, and that, had he been on the jury, he should so have found, but he added, that he, was not dissatisfied with the verdict as it stood. Thompson, C. B., having stated the case and report:—The question is, whether the property in this water belongs to one party or the other, and is certainly one of very considerable importance to their interest, as the verdict of the jury will have the effect of conclusively deciding the right on all future occasions; and therefore we think that it ought to go down to another trial, defendant paying costs.

Or that it was contrary to the direction of the judge;

5. MINIKEN v. CREMMENT. M. T. 1818. K. B. 1 B. & A. 252.

In this case a legal objection was taken on the trial and overruled by the judge, without reserving the point. On motion for a new trial, the Court were of opinion, that the objection was a good ground of nonsuit they therefore granted a new trial only, but would not permit a nonsuit to be entered.

Or, that the judge overruled a point which he ought to have reserved.

6. ESTWICK v. CAILLAND. M. T. 1793. K. B. 5 T. R. 425.

Buller, J. On an application for a new trial the only question is whether, under all the circumstances of the case, the verdict be or be not according to the justice of the case; for, though the judge may have made some little slip in his directions to the jury, yet if justice be done to the verdict, the Court ought not to interfere and set it aside. If, indeed, the facts be doubtful, and the attention of the jury has been drawn from the consideration of them, that is a ground for a new trial; but if the facts be clear, and those facts have been laid before the jury, we ought not to grant a new trial in order to give the unsuccessful party a chance of obtaining another verdict.

And it should also appear that the verdict was contrary to justice,

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7. WILKINSON. v. PAYNE. M. T. 1791. K. B. 4 T. R. 468.

*Per Cur.* To induce us to grant a new trial it should appear that the verdict is contrary to equity.

And equity.

8. VERNON v. HANKEY. M. T. 1787. K. B. 2 T. R. 113.

Buller, J. It is a great personal satisfaction to me that this matter has been brought before the Court. Motions for new trials have been very much encouraged of late years, and I shall never discourage them, for nothing tends more to the due administration of justice, or even to the satisfaction of the parties themselves, than applications of this kind. The Court and counsel are enabled to consider the question more fully than they could in the hurry of a business at Nisi Prius. Value alone is not a ground for granting a new trial, although it frequently weighs in granting a rule to show cause.

However, value and importance are not alone grounds for a new trial;

9. SWINNERTON v. STAFFORD. E. T. 1810 C. P. 3 Taunt. 91.

*Per Mansfield, C. J.* Where there has been but a short time for investigating a question of real property of a doubtful and obscure nature, and of great value, although conflicting evidence has been left to the jury, and the Court does not think their verdict wrong; yet if the inheritance is to be bound forever by the verdict, the Court will grant a new trial on payment of costs.

Unless it binds the right for ever;

10. REAVERLEY v. MAINWARING M. T. 1798. K. B. 3 Burr. 1306.

*Per Cur.* The hardship of the case forms no ground for a new trial.

Even tho' it be a very hard case.

11. VERNON v. HANKEY. M. T. 1787. K. B. 2. T. R. 113. ROGERS v. STEVENS. M. T. 1783. K. B. 2 T. R. 713. PETRIE v. WHITE, H. T. 1798. K. B. 3 T. R. 8.

The Court will not grant a new trial, to let the party into a defence of which he was apprised at the first trial.

So, an objection which might have been made at the trial;

Or where there has been a competent trial;

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Or, where the issue on the second would be the same as the first; Or merely on a point of law reserved;

Or on a point of law abandoned at the trial, a new investigation will not be granted. If in covenant conditioned for an increased rent if certain events happen, and they take place, and the jury find the original rent and not the increased as damages the Court will grant a new trial. A new trial may be granted in ejectment; [ 173 ] And it has been allowed where a verdict was found for the defendant.\* In penal actions, after verdict for defendant

## 12. CAMDEN v. COWLEY. T. T. 1763. K. B. 1 Blac. 4181.

Motion for a new trial, the verdict being, as was suggested, contrary to the sense and meaning of the parties concerned.

Mansfield, C. J. stated to the Court the ship in question was what is called a general ship, viz. advertized at Lloyd's Coffee-house, as bound to the island and generally, and by the course of trade to touch at the several ports of the island there to deliver some goods, and take in others; that it was insured at and from J., and warranted to depart with convoy; the policy was very inaccurately worded, in not defining what was meant by being at J.; and I left it to the jury, which was a very competent one. The inclination of my opinion was the contrary way; but I think it was thoroughly tried, and that no light could be thrown in; and, therefore, I am against getting a new trial, which, if the verdict should be contradictory, must in the end produce a third.

## 13. WATKINS v. TOWERS. H. T. 1787. K. B. 2 T. R. 275.

Per Ashhurst, J. A new trial will never be granted where the issue on the second would be the same as on the first.

## 14. COX v. KITCHIN. E. T. 1801. C. P. 1 B. & P. 338.

Per Buller, J. Motions for new trials are governed by the discretion of the Court. Where the judge at Nisi Prius has thought fit to save a point, the Court have been in the habit of considering itself in the situation of a judge at the time of the objection raised. But this case comes before us without any point saved, and therefore we must look to the general justice of the case before we interpose, granting a new trial; nor is it necessary that we should nicely examine whether the defendant be strictly liable in point of law.

## 15. ROBINSON v. COOK. E. T. 1813. C. P. 6 Taunt. 336.

The plaintiff's counsel acquiesced in the judge's ruling at the trial, whereby the defendant took a verdict without going into his case; the plaintiff will not be afterwards permitted to move for a new trial on the ground of a misdirection.

### 2nd. In particular.

#### 1. In particular forms of action.

##### (a) Covenant.

## FARRANT v. OLMUS. T. T. 1820. K. B. 3 B. & A. 932.

In covenant by lessor against lessee, upon a lease reserving an increased rent for every acre of certain land converted into tillage, the jury by their verdict having given damages for the actual injury sustained instead of the increased rent, the Court will not refuse the plaintiff a new trial: 1st. On the ground that the verdict was consistent with justice; 2nd. The judge having expressly directed the jury to find damages to the amount of the increased rent. The Court granted the new trial without payment of costs.

##### (b) Ejectment.

## 1. GOODTITLE D. ALEXANDER, v. CLAYTON. M. T. 1797. K. B. 4 Burr. 2224.

In ejectment the Court allowed a new trial.

## 2. BURGE v. CALLOWAY. E. T. 1814. Ex. 7 Price, 677.

The lessors of the plaintiff have, since the trial, discovered that they had conclusive evidence of a material fact, the marriage of their ancestor, which they failed to prove at the trial, in consequence of mistaking the christian name of the person to whom the ancestor had been married. The Court will in some cases grant a new trial of an ejectment where a verdict has been found for the defendant.

##### (c) Penal actions.

## 1. FONEREAU v. ———. E. T. 1770. C. P. 3 Wils. 59.

In an action upon the statute against bribery, there was a verdict for the defendant, and now a new trial was moved for as being against evidence. But *Per Cur.* We never grant new trials in actions on penal laws, and it has

\* Though formerly a different rule obtained; 2 Salk. 648.

been so held for more than fifty years past. The Court condemned the case in 2 Keb. 226. a new trial will not be granted;\*

2. *BROOK v. MIDDLETON*. H. T. 1811. K. B. 10 East, 268.

The jury having found a verdict for the defendant in an action for usury, it was moved for a new trial with respect to one of the counts, it being a verdict against all the evidence, the usury consisting in taking a quarter per cent. upon the loan in the name of commission, the lender having nothing to do for it but to receive the money at the appointed time of repayment. Even where the verdict is against evidence.

Lord Ellenborough, C. J., said that, if the Court did not find themselves precluded from entertaining the motion on the ground of the verdict being against the evidence, they would hear counsel further upon it; and before the Court rose on this day, his lordship referred to the case of *Fonereau v. —*, where the Court said that the rule had been laid down for fifty years past not to grant new trials in actions on penal laws where the verdict was for the defendant. There indeed the doctrine was laid down rather too generally, as the Court would certainly grant a new trial in case of the misdirection of the judge in point of law; but in case of a verdict against evidence the rule was not settled, so that no new trial would be granted, which was sufficient to dispose of the present motion, and, therefore, they refused the rule.

(d) *Trespass.*

1. *SAMPSON v. APFLEYARD*. M. T. 1771. C. P. 3 Wils. 272.

In trespass the defendant prescribes for a way over the close in which, &c., and mistakes the *terminus quo* in his plea; verdict for the defendant. The Court refused to grant a new trial, the merits having been tried. [ 174 ]  
In trespass, if the merits have been gone into a new trial will not be allowed; Even tho' the judge told the jury the weight of evidence was on the wrong side, unless he has expressed himself dissatisfied with the verdict, in an action for a malicious prosecution the Court refused a new trial, the verdict was against evidence.

2. *COLEBROOK v. THE ATTORNEY-GENERAL*. M. T. 1813. Ex. 6 Price, 146.

On a question of title in an action of trespass between a parish and an individual to certain land under an inclosure act, by the provisions of which the land in dispute would (if they had a right to it) be vested in them in trust for the parish in aid of the poor-rates. The Court will not disturb a verdict in an action of trespass on the mere ground of the judge at Nisi Prius having directed the jury that the weight of evidence was with the other party, where he does not report himself dissatisfied with the finding.

2. *As to particular causes of action.*

(a) *Connected with commons.*†

(b) *Connected with illegal contracts.*‡

(c) *Connected with malicious prosecution.*

*NORRIS v. TYLER*. E. T. 1774. K. B. Cowp. 37.

This was an action for a malicious prosecution, in preferring a bill of indictment against the plaintiff for forging a note of hand. Four witnesses were called to prove that the hand-writing was not the plaintiff's, and the judge directed the jury in his favour; but the jury found a verdict for the defendant. Upon a motion for a rule to show cause why the verdict should not be set aside, as being a verdict against evidence, and a new trial granted,

The Court said the cause had been sufficiently tried once, and where the suit was of a criminal nature a new trial was usually refused.

(d) *Connected with negligence.*

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\* Even though the jury be mistaken as to facts; *aliter*, if misdirected; *Wilson v. Ras-tall*, 4 T. R. 753.

† In *Hetherington v. Vane*. 4 B. and A. 428. where the plaintiff, being possessed of house and lands in E., had for sixty years exercised rights of common in W.; but it appeared that this was done near the boundary of the two commons of W. and E. which lay open and uninclosed, adjacent to each other; and it also appeared that the parties exercising the right did not at the time know the exact boundary, and that plaintiff had, on a previous enclosure of the E. common, obtained an allotment there in respect of his estate. Held, that the judge was right in leaving it to the jury to say whether the evidence was referable to an exercise of the right in E., and the mistake of a boundary, or to an exercise of the right in W.

‡ If a contract be legal on the face of it, though illegal in fact, after verdict for plaintiff, the Court will not grant a new trial to enable the defendant to show the circumstances which rendered it illegal; *Gist v. Masop*, 1 T. R. 84.

## COLLIOGEN V. LARKINS. M. T. 1803. C. P. 3 Taunt. 1.

In an action for negligence, a new trial will not be granted though the injury appear to have resulted partly from plaintiff's own misconduct

A vessel was damaged: the jury found for the plaintiff. Motion for a new trial, because there was some ground to believe that the plaintiff was negligent in navigating his vessel as well as the defendant.

Mansfield, C. J. I should have no objection to this cause being tried again, if I thought any new light could be thrown upon it; and, had I been on the jury, I should have made such allowances for the darkness of the night that I should have found for the defendant, attributing the cause to mere accident and a dark foggy night. There was some contradiction between the witnesses as to the distance at which the ships first discovered each other and hailed. It was attempted to insinuate that the defendants tried to delude the plaintiffs by concealing the name of their ship; but this insinuation was afterwards done away. Two masters of the Trinity House who were present during the trial thought the Susannah did wrong in lying-to, but they thought the Larkins did not do quite right in going seven knots an hour in the middle of a convoy in a thick foggy night, because her going so very fast might be the very reason why her crew could not prevent the accident; if she had been going slower they might have been enabled to wear ship in time. They, therefore, thought both parties in some measure blameable.

(e) *Connected with slander.*

## WILSON V. STEPHENSON. H. T. 1811. Ex. 2 Price, 282.

If justice has been done, a new trial will not be granted in action for slander.

The jury found that words directly charging the plaintiff with being a murderer, and having murdered his brother, were spoken by the defendant, but not maliciously; on which a verdict was recorded for the defendant. The Court would not grant a new trial, on the ground that it was a verdict against evidence, although it had been proved on the trial that the words were spoken in anger, and it appeared that the plaintiff had accidentally been the cause of his brother's death.

(f) *Connected with usury.* See part 4. (b) Hand-bills, Distribution of.

3. *As to particular persons.*

(a) *Of bankrupts.* See ante, tit. Bankrupt.

(b) *Executors and administrators.* See ante, tit. Executors and Administrators.

4. *As to particular grounds.*

(a) *Absence of Attorney, or improper conduct of counsel.*

## 1. DE REMPIGNEY V. PEALE. E. T. 1809. C. P. 3 Taunt. 484.

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Where a cause is undefended through the attorney's neglect a new trial will be granted and the attorney ordered to pay costs. But the omission of counsel to produce evidence stated in his brief, because he deemed it prudent, is no ground for a new trial.

In this case, through the attorney's neglect and misconduct, the trial was lost, in consequence of the cause being tried as undefended. On motion for a new trial, the Court made the rule absolute, ordering the attorney, however, to pay the costs.

## 2. SPENG V. HOG. H. T. 1771. C. P. 2 Blac. 802.

The defendant had intrusted the plaintiff to look after his house, at Twickenham, during his absence in Oxfordshire; and, on his return, finding his drawers, &c. broke open, and his house rifled, charged the plaintiff with the robbery, and on the 19th of June, 1771, got a seach warrant from a justice of peace, and searched the plaintiff's house, but found nothing therein to justify his suspicions. On the 21st, he renewed his accusation of the plaintiff, and carried him before a justice on the 22d, who discharged him. Upon this, S., the plaintiff, brought two actions against H.; one for trespass, seaching his house without sufficient cause, on the 19th; the other for slander, on the 21st; but the action of slander was set down, and tried first; and the counsel for the defendant not thinking it prudent to give any evidence in mitigation of damages, which might seem like a justification, the jury gave the plaintiff a verdict, with 100*l.* damages. Next came on the trial on the action of trespass, when the defendant made a full defence, and gave such evidence of a reasonable cause of suspicion, that the jury found a verdict for the defendant. And now motion was made for a new trial in the action of slander, the damages appearing to be excessive, from the circumstances that came out on the second trial. De Grey, C. J. The only ground upon which this rule can be sup-



ported is, because the defendant might have given evidence in mitigation of damages which then it appeared prudent to omit. This never was a ground for a new trial; hardly a case happens where evidence of some kind or other is not in discretion kept back; and it would be of fatal consequence to give the parties an opportunity of introducing new evidence when they see where the cause presses.

(b) *Damages too small.*

1. HAYWARD v. NEWTON. M. T. 1732. K. B. 2 Stra. 940; 2 Doug. 507.

An action was brought for these words spoken of the plaintiff as a wine merchant; "You are a rogue, villain, and rascal, and fill by short measure;" and the jury gave 20s. damages; and, though it was thought a hard case, yet the Court said it had always been denied to set aside a verdict for smallness of damages, and therefore denied it in this case. Damages being too small is no ground for a new trial.

2. MARKHAM v. MIDDLETON. T. T. 1745. K. B. 2 Stra. 1259.

The defendant owed the plaintiff 333l. for an apothecary's bill, and suffered judgment to go by default, and the plaintiff's attorney, on executing the inquiry, produced the foreman, who had told him he could prove the bill, but when the jury was sworn he declined giving any evidence. Upon which the sheriff was desired to adjourn, which he thought he could not do; and the jury thereupon found one penny damages only. This was moved to be set aside, upon the head of surprise and mistake of the sheriff, upon the authority of Woodford v. Eades, and Parry v. Niblet. [ 177 ] Unless it has arisen from some mistake in point of law;

The Court thought it hard the plaintiff should be paid so large a debt with 1d., as he would be if this verdict stood, or that his case should be worse for the defendant's letting judgment go by default; for, had he pleaded, the plaintiff could have suffered a nonsuit; and therefore they set aside this, and ordered a new writ of inquiry on payment of costs.

3. SNELL v. TIMBRELL. M. T. 1725. K. B. 1 Stra. 643.

On a contract for stock between the plaintiff and J. S., they each deposit 200l. in the hands of the defendant, and J. S. not performing his agreement, the plaintiff sued for the deposit, had judgment on demurrer, took out a writ of inquiry, and proved his case; but the jury, on a notion that the defendant could not pay out the money without the consent of both parties, gave 1d. damages, which was now set aside; the Court said that the rule of not setting aside verdicts for the smallness of damages did not extend to this case, where the jury mistook in point of law; and the Chief Justice said he knew no reason why the Court should not interpose. Or the jury;

4. REX v. BEAR. E. T. 1696. K. B. 2 Salk. 646.

Motion for a new trial on an indictment for perjury.

Per Holt, C. J. For perjury we never grant new trials, because the verdict is against evidence; but if you prove a trick or unfair practice, that is a good ground. Or from some unfair practice on the part of one of the suitors.

(c) *Damages too large.*

1. SHARP v. BRICE. E. T. 1773. C. P. 2 Blac. 942. PLEYDELL v. LORD DORCHESTER. H. T. 1790 K. B. 7 T. R. 527.

Trespass against a Custom-house officer, for an unsuccessful search after prohibited and uncustomed goods; verdict for the plaintiff, with 500l. damages. Perrot, B., who tried the cause, reported the damages to be very excessive, and advised an application for a new trial, which was accordingly moved for. De Grey, C. J. It has never been laid down, that the Court will not grant a new trial for excessive damages in any cases of trespass. It was held so long as in Comb. 357. that the jury have not a despotic power in such actions. The utmost that can be said is, and very truly, that the same rule does not prevail upon questions of tort as of contract. Damages being too large is no ground for a new trial unless out rageously so; [ 178 ]

2. REX v. MAUBEY. E. T. 1796. K. B. 6 T. R. 619.

Per Lord Kenyon, C. J. If, on application for a new trial, it appear that the damages are excessive, from the jury having acted from undue motives or gross error; a new investigation must be had. Or the jury have acted from undue motives or gross error.

(d) *Evidence improperly admitted.*

The improper admission of evidence is no ground for a new trial, where the other proof authorised the verdict.

Verdict against evidence is no ground for a new trial where damages do not exceed 5*l*.

Rejection of one kind of evidence where the same fact was proved by another is no ground for a new trial. New evidence since discovered is a ground for a new trial.

[ 179 ]

The distribution of handbills to the jury reflecting on plaintiff's character is a ground for a new trial.\*

That the case should have gone to the jury, unless requested, is no ground for a new trial.†

That the at

**HORFORD v. WILSON.** T. T. 1807. C. P. 1 Taunt. 12.

In an action against the drawer of a bill of exchange, in consequence of the acceptor's default, the Court left it to the jury to presume from circumstances, such as the payment of a part of a bill without any objection to want of notice, &c., that due notice was regularly given. On motion for a new trial, the Court held, that the improper admission of evidence was no ground for a new trial, where the other proof warranted a verdict.

(e) *Evidence, verdict against.*

**ROBERTS v. KARR.** H. T. 1808. C. P. 1 Taunt. 495.

The Court of C. P. will not grant a new trial on account of a verdict being against evidence where the damage to be recovered would not exceed 5*l*.

(f) *Evidence, rejection of.*

**EDWARDS v. EVANS.** T. T. 1804. K. B. 3 East, 451.

In an action for bribery at an election for members to serve in parliament, the Court said: It is no ground for a new trial, that a witness called to prove a certain fact was rejected on a supposed ground of incompetency, where another witness, who was called, established the same fact, which was not disputed by the other side, and the defence proceeded upon a collateral point, upon which the verdict turned.

(g) *Evidence, discovery of new.*

**BROADHEAD v. MARSHALL.** T. T. 1773. C. P. 2 Blac. 955.

The plaintiff had delivered two bills, one for job work to the amount of 12*l*. and 40*l*. promised to be paid him if any gentleman or lady would say that a coach which he made for the testator was worth 200*l*., and that Lady Ashton said it was: total, 161*l*. The other bill was for 12*l*. job work, and 200*l*. for a coach, giving credit for 150*l*. received by him on account the 18th of March, 1772. Balance, 161*l*. on this last bill. The action was brought in Hilary term last, and tried at the sittings after Easter term, when the jury found a verdict for the plaintiff, damages 161*l*. Motion for a new trial on the affidavit of Ramsden, the defendant's attorney, stating that the defendant sailed for Barbadoes on the 20th of April last, being the first day of Easter term; that since the trial he had discovered in a memorandum book of the defendant a receipt. On the special circumstances of the case, and the discovery of very material evidence above stated, the Court made the rule absolute for a new trial.

(h) *Hand-bills casting reflections.*

**COSTAR v. MESERT.** E. T. 1820. C. P. 3 B. & B. 272.

In this case it was sworn that hand-bills reflecting on the plaintiff's character had been distributed in court, and shown the jury on the day of trial. The Court would not receive from the jury affidavits in contradiction, and granted a new trial against the defendants, though they denied all knowledge of the hand-bills.

(i) *Jury in general.†*

**KINDRED v. BAGG.** T. T. 1807. C. P. 1 Taunt. 10.

The Court of Common Pleas will not set aside a nonsuit on the ground that the case ought to have been submitted to the jury, unless this was desired on the part of the plaintiff at the trial of the cause.

(j) *Jury, being related.†*

(k) *Jury, being summoned by defendant's attorney.*

**MASON v. VANEY.** E. T. 1803. K. B. 1 Smith, 304.

Motion for a new trial. This was an action by the plaintiff, an attorney at

\* But where in a *quæ tam* action for usury, the principal witness, the borrower, had distributed a printed memoir, containing a statement of the case, which was only in effect what he proved, and it did not appear to have been seen by the jury, nor to be calculated to influence them, held that the discovery of this circumstance after the trial was not a sufficient cause for a new trial.

† Subsequent declaration of the jury should not vitiate a general verdict given according to the merits of the case; *Clark v. Stevenson*, 2 Black. 808.

‡ *Semble*, no ground for a new trial; see *ante*, vol. ii. p. 739, &c.

Coventry, for defending the defendant and three others at the quarter sessions. The clerk to the attorney proved the business done. The defence set up was, that Mason had given credit to another person; and a witness was called to prove that one Hawes had agreed to pay the attorney if he would undertake the cause for the defendant, and that Mason gave Hawes credit originally. Hawes, however, being called, contradicted all that witness had said, and declared that he had never undertaken to pay. The jury found a verdict for the defendant, which it was now contended was contrary to the evidence, and counsel offered an affidavit that the attorney for the defendant was the under-sheriff, who had the summoning of the jury.

torney for defendant was under sheriff and summoned the jury is no ground for a new trial.

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Lord Ellenborough, C. J. If that were the case you might have challenged the array; not having done so, that circumstance must be laid out of our consideration; and there being evidence on both sides, it is the common case of a mere question of credit between the two witnesses, on which the jury have decided.

(l) *Jury—one being not the party intended.*

HILL v. YATES, E. T. 1813. K. B. 12 East, 229.

The Court, considering the extreme mischief which might result to the public from setting aside a verdict upon a motion for a new trial on the ground that one of the jurymen was not the person intended, inasmuch as the same objection might happen to lie against every verdict on the civil and criminal sides at the assizes; and recollecting that the same objection had been taken for a new trial.\*

A jurymen not being the person intended is no ground for a new trial.\*

(m) *Jury having cast lots.*

AYLETT v. JEWELL, T. T. 1778. C. P. 2 Blac. 1299.

Motion for a new trial on an affidavit of the defendant's attorney that some of the jury had confessed to him that, not being able to agree in their verdict, they consented that, all the jurors' names being separately written on papers and shook together in a hat, the first six that should be drawn should decide the verdict, and they all agreed to conform to the opinion of the major part of those six; which was accordingly carried into execution, and so the verdict was produced. But there being no affidavit by the jurymen, or any other that was cognizant of this transaction, but merely this hearsay affidavit, the Court (absent De Grey, C. J.) thought it too dangerous to call a verdict in question that had been so deliberately given upon so loose and slight a suggestion, and so refused a rule to show cause.

Nor a confession by a jurymen to defend ant's attorney that they cast lots.

(n) *Misdirection of the judge.†*

(o) *Trial, want of due notice of.*

[ 181 ]

1. ANON. H. T. 1806. Ex. 3 Price, 72.

The defendants in a joint information employ two different attorneys and clerks in court. Notice of trial was served on one of them only, and a verdict was obtained against both. On motion for a new trial, the Court will set it aside, and award a new trial as to both, notwithstanding the offence charged affected them both as partners in trade.

Want of due notice of trial is a ground for a new trial;

2. THERMOFIN v. COLE. H. T. 1695. K. B. 2 Salk. 646.

*Per Cur.* If the defendant appears, and makes defence, he shall never have a new trial for want of due notice.

Unless defendant appear and make defence.

(p) *Witnesses, absence of.*

\* And where, upon the trial of an information for a libel, only ten special jurymen appeared, and two talesmen were sworn on the jury, it was decided to be no ground for a new trial, that two of the non-attending special jurymen named in the panel had not been summoned, though it appeared that this fact was unknown to the defendant until after the trial. 4 Barn. & Ald. 430.

† If the judge direct the jury to find nominal damages, and the plaintiff elect to be nonsuited, it is not such a misdirection as to induce the Court to grant a new trial; 3 Taunt. 299.

REX v. PARADE. M. T. 1695. K. B. 2 Salk. 645.

Non-attendance of a material witness is a ground for a new trial.<sup>a</sup>

A mistake by a witness in a material fact is a ground for a new trial.<sup>†</sup>

[ 182 ]  
A new trial will not be granted on the ground of perjury in a witness.<sup>‡</sup>  
A subsequent discovery of incompetency in a witness is no ground for a new trial.

A new trial was granted because the counsel were absent, not thinking the cause would come on, and no defence was made; but a like motion was denied in the King's Bench, per Holt, C. J. Also, in one Coppin's cause, a cause came on at seven in the morning, and an old witness could not rise to be there time enough; but it was denied, unless he would make affidavit of what he knew, and would answer, so that the Court might judge of it, and how it was material.

(q) *Witnesses, mistake by.*

DE GIOU v. DOVER. E. T. 1802. Ex. 2 Anst. 516.

In this case it appeared that a witness had made a mistake in a material fact.—The Court granted a new trial.

(r) *Witnesses, perjury by.*

FABULARS v. CORK. T. T. 1797: K. B. 3 Burr. 1771,

Motion for a new trial, on the ground that the witnesses have committed perjury.—The Court refused it.

(s) *Witnesses, incompetency of.*

TURNER v. PEATE. T. T. 1798. K. B. 7 T. R. 717.

This action was brought for withdrawing suit from the mill of the plaintiffs, situated within the manor of Leeds, which suit they claimed as lords of the said manor. The defendant set up an exemption as being situated within the manor of Whitkirk-cum-membris, which was part of the possessions of the Knights of St. John of Jerusalem, the tenants of which manor had always been exempt from doing suit to the mill of the lord of the manor of Leeds. It appeared that the manor of Whitkirk extended into the manor of Leeds, and the defendant brought evidence to prove that the houses in respect of which this exemption was claimed were situated within that part of Whitkirk, and were distinguished by the mark of a cross. The jury found a verdict for the defendant, and a new trial was moved for this term upon two grounds:—First, that it was a verdict against evidence. Secondly, upon an affidavit that it had been discovered since the trial that five out of nine of the witnesses on the part of the defendant were interested in the event of the cause, and therefore were incompetent, and ought not to have been received.

Ashhurst, J. The regular time for objecting to the incompetency of witnesses is at the trial. The ancient doctrine on this head was so strict that, if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that strictness may in some measure be relaxed by the custom of suffering witnesses to be examined conditionally, which is only waiving the objection for the time. But still the objection must be made at the trial. Besides the affidavit on the part of the plaintiffs is answered as to the bias which might be supposed to be on their minds; for they swear that they did not know of any subscription at the time of giving their evidence.

(t) *Variance, on account of.*

\* And the Court have granted it without costs where a material witness for the defendant was kept out of the way by the contrivance of the plaintiff, to prevent him from being served with a subpoena; Bul. N. P. 328.

† Where the facts upon which the witnesses themselves founded their testimony are falsified by affidavit, a new trial will be granted; Lister v. Mundell, 1 B. & P. 427. In an action on a policy, where the defendant, by the mistake of his witness, failed in producing the necessary document from the Admiralty, for proving a breach of the convey act, the Court granted a new trial, in order to let him into his defence after verdict found for the plaintiff on the merits; D'Aguilar v. Tobin, 2 Marshall, 265.

‡ The Court will not, after verdict, arrest a judgment on affidavit that a bill has been found against a witness indicted for perjury on a material point of evidence given by him on the trial; nor does it seem that a conviction would be sufficient ground for sending a cause back to a jury for re-investigation; Attorney-General v. Woodhead, 2 Price, 8.

§ And for the effect of a variance between the issue and Nisi Prius record, see 8 Taunt. 634; 2 Barn. and Ald. 472; 1 Chit. Rep. 227; S. C. Id. 2778, n.; and also *post*, tit. Variance.

THOMPSON v. SIMMONS. E. T. 1733. C. P. Barnes, 475.

Motion to set aside the verdict, the record of Nisi Prius differing from the A material issue-book delivered, the defendant's name being inserted in the paper book, variance is in joining issue, instead of plaintiff's; but, in the record, plaintiff's name was a ground inserted, and the issue properly joined. But two issues being joined, and a for a new trial. general verdict found for plaintiff, the Court refused to make any rule: [ 183 ]

5. Upon issue out of Chancery.\* 6. After bill of exceptions.†

7. After trial at bar.

GAY v. CROSS. T. T. 1702. K. B. 7 Mod. 37. SMITH, D. DORMER, v. PARK-HURST. H. T. 1738. K. B. 2 Stra. 1105.

The plaintiff brought an action on the case for a false return to a *mandamus* A new trial to swear him common-councilman for the borough of Totness. The jury, may be had having given their verdict in private over-night, said that they had found the after a trial matter specially, and the next day in Court delivered their verdict for the at bar. defendant generally, and would give no reason for it, nor be moved to depart from it. And hereupon a new trial was moved for, and the case of Wood v. Gunston in Stiles, 462; and a case of the Welsh Drovers were quoted for new trials after a trial at bar.—The Court would not grant a new trial. But see Stiles, 466; 1 Stra. 284; 1 Ld. Raym. 1358; 2 Stra. 1105; 1 Burr. 395; 4 Burr. 1986; 2 Bl. Rep. 698; 3 Wils. 146. 338: new trials granted after a trial at bar.

8. After nonsuit.

FORBES v. WALK. M. T. 1764. K. B. 1 Blac. 532.

Debt on bond, dated 20th of March, 1732. Pleas: *non est factum*; *solvit ad post diem*; and *solvit post diem*. The plaintiff insisted on reading the bond, A new trial without any proof of the execution being of so old a date. It was objected cannot be for the defendant, that it could not be read till proved, there having been no obtained af payment of interest, or any other marks of authenticity; and that, if the ter nonsuit. length of the date was alone sufficient to establish it, a knave has nothing to do but to forge a bond with a very ancient date.

Lord Mansfield, J., allowed the distinction, and directed the bond to be proved. Plaintiff proved, by two persons, that it was the defendant's hand, [ 184 ] and that one of the subscribing witnesses was dead; but being himself examined, acknowledged the other to be living; whereupon he was nonsuited. But Lord Mansfield directed a new trial to be moved for, which, he said, should be at the cost of the defendant; but, on moving the Court the last day of term, it was refused, because, by the nonsuit, the parties are out of court.

9. After concurring verdicts.

GOODWIN v. GIBBONS. E. T. 1798. 4 Burr. 2108.

The question was, whether two concurring verdicts was an answer to an application for a new trial. The Court held it was not.

10. After contrary verdicts.

SPONG v. HOG. H. T. 1771. C. P. 2 Blac. 802.

Per De Grey, C. J. Conflicting verdicts is no reason for a new trial. A new trial We cannot impeach the opinion of a jury in one cause by the opinion of a dicting ver jury in another, especially where the evidence is different, and the point in dict is no issue not exactly the same. ground for a new trial.

11. After special case defectively stated.

DARILLA v. HEMING. E. T. 1719. K. B. 1 Stra. 300. S. P. HAWKEY v.

SMITH. M. T. 1789. K. B. 3 T. R. 507.

Upon trial of the issue, a case was made, and afterwards argued in court; After spe

\* When the Court of Chancery directs an action at law, even in cases where such ac- tion could not be maintained without its direction, as where the defendant therein is a cer- tificated bankrupt, it does not consider the action as tried unless the Court at law is satisfied with the verdict. Until that event, therefore, such Court has full dominion over the suit, and may direct a new trial if dissatisfied with the verdict; Carstairs v. Stein, 4 M. and S. 192.

† When a bill of exceptions has been tendered, the Court will not grant a motion for a new trial unless the bill of exceptions be abandoned; 2 Chit. Rep. 272.

stated a new trial may be obtained.

but the fact not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed, to go to a new trial, where the plaintiff was nonsuited. See 10 *East*, 416.

12. *After point reserved.\**

13. *After motion in arrest of judgment.*

[ 185 ]

TUBERRIL V. STAMP. M. T. 1696. K. B. 2 Salk. 647.

As a general rule, no new trial can be moved for after motion in arrest of judgment.†

Per Holt, C. J. A party shall not move for a new trial after motion in arrest of judgment; but, after a motion for a new trial, he may move in arrest of judgment. So it is in a writ of inquiry. After motion in arrest of judgment, the defendant cannot move for a new writ. After motion in arrest of judgment, a new trial may be granted for misbehaviour of the jury, Phillips v. Fowler, Com. 525; or where, on the report of the trial of an indictment, enough appeared to raise an inclination in the Court to think the defendant ought not to have been convicted; Rex v. Gough, Doug. 797; West v. Cole, Mich. 10 W. 3. B. R. The same point was held in C. B., Pasch. 8 W. 3. Phillips v. Orabb.

(b) *By what court.*

An inferior court can only grant a new trial for irregularity, and not upon the merits.‡

1. REGINA V. HILL. E. T. 1702. K. B. 1 Salk. 203; 1 Stra. 113; Doug. 330. Judgment was given in the Town Court of Bristol, and costs taxed, and a *scire facias* taken out against the bail, and a year afterwards the court granted a new trial, and set aside the first judgment; and an attachment was granted against the judge for this cause, because an inferior court can only grant a new trial on the merits.

2. BOWKER V. NIXON. H. T. 1816. C. P. 6 Taunt. 444.

And on an issue out of Chancery the application for a new trial must be made in Chancery.§

This was an issue directed by the Court of Chancery. Motion for a new trial upon the ground that certain evidence had been improperly rejected. The counsel stated he was aware that the general rule with respect to issues out of Chancery required that the motion for a new trial should be first made in that court, but he conceived that, where the point related to the propriety of the decision of the judge who presided at the trial as to the admission or rejection of evidence, it formed an exception to the rule, and that the motion in such case ought to be first made in the court of law.

The Court held that, in questions of evidence, as well as all other cases,

\* On the trial of an issue in the King's Bench a case was made, and afterwards argued in court but the facts not being sufficiently stated, so as the court could give judgment according to the justice of the cause, it was recommended to the parties, and accordingly they agreed to go to a new trial, when the plaintiff was nonsuited; and the question being about costs, whether the Master should tax the common costs of a nonsuit, or take into his consideration all the former proceedings; upon motion for the Court's direction to the Master, it was ordered that he should tax the defendant his costs upon the whole, as well with relation to the first trial as the last; 1 Str. 300. From the statement of this case it does not appear whether, upon granting a new trial, any thing was said about the costs for the former trial or whether they were directed to abide the event of the suit. If they were not, it seems from the subsequent cases, 3 Darn. and East, 507; 6 Darn. and East, 71, that at this day they would not have been allowed. But where, after the argument of a special case, the Court directed a new trial, because the case was insufficiently stated, and the defendant without going to trial again gave the plaintiff a *cognovit*; the Court held, that the defendant was liable to pay costs of the former trial; 6 Darn. and East, 144.

† This rule, however, extends only to cases where the party has the knowledge of the fact at the time of moving in arrest of judgment; therefore a new trial was granted after such a motion on affidavits of two of the jury, that they drew lots for the verdict, Pr. Reg. 409; Pal. Ni. Pri. 325, 326; *sed quare*, whether such affidavits would not be received; ante, 181.

‡ And the Court of King's Bench would not interfere by *mandamus* to compel an inferior Court to grant a new trial in a cause wherein it was alleged injustice had been done to the parties; 2 Chit. Rep. 250. An inferior court however, has power to set aside a regular interlocutory judgment, in order to let in a trial of the merits; 1 Burr. 671.

§ And it is in the discretion of that Court to grant or refuse a new trial of an issue directed to be tried at law, for the issue having been originally directed merely to satisfy the conscience of the Court on facts material to the equity of the case, it may order evidence

the distinction made in this respect between issues out of courts of equity and other actions was to be observed, and that this application must first be made to the Court of Chancery.—Rule discharged. [ 186 ]

(c) *Where several defendants.*

PARKER v. GODIN. M. T. 1728. K. B. 2 Stra. Rex v. MAWBY. E. T. 1795. K. B. 6 T. R. 538.

It was agreed on all hands, that if one defendant be acquitted and another found guilty, the defendant can have no new trial.

(d) *Where several issues.*

REX v. MAWBY. E. T. 1795. K. B. 6 T. R. 626.

In this case Grose, J. said, he remembered a case tried some years ago at Bristol, where a new trial was granted as to one issue out of several which had been found against the evidence.

(e) *On what terms a new trial may be granted.*

POCHIN v. PAWLEY. E. T. 1768. K. B. 1 Blac. 670.

Action of *assumpsit* against the surveyor of a turnpike-road, by a farmer employed by order of the commissioners to repair the road, at Leicester asizes. Ashton, J., was of opinion, that there was no evidence of any contract with the surveyor personally and the plaintiff, but that the contract was made with the commissioners, and that the surveyor was only their servant or messenger, and, therefore, he would have nonsuited the plaintiff, but he refused to be nonsuited, and a jury of farmers gave a verdict for the plaintiff. And now, on a motion for a new trial, the Court was unanimously of opinion with Mr. Justice Ashton; and though they held that the commissioners could not be personally sued, being too numerous, yet their treasurer might; and as the plaintiff had refused to be nonsuited, contrary to the opinion of the judge, they granted the new trial without costs. [ 187 ]

(f) *Motion and rule for.* §

to be received, although not strictly admissible on other trials at law; it will send the issue down as often as the result is not satisfactory; or, if satisfied that the finding of the jury is agreeable to the equity of the case, it will not order a new trial on the ground that inadmissible evidence (strictly so called) has been received below; 2 Price, 39. But where on the trial of the issue decided by the Chancellor, leave is given by the judge to move for a new trial, the motion may, it seems, be made in the Court where the cause was tried, 2 Chit. Rep. 270; and, in an action brought under the Chancellor's order, the application for a new trial may be made either in Chancery, 2 Atk. 319; or in the court where the action is depending.

\* Therefore, in trespass against several, where the verdict was contrary to evidence as to one of them, a new trial was refused; 2 Salk. 362.

† Therefore, where one of four issues was found against evidence, the Court granted a new trial, not only as to such issues, for that, they said could not be but for the whole; but then the issue found against evidence must be a material one, for if two of three issues, be found against evidence, yet if the material issue in the cause be agreeable to evidence, the Court will not grant a new trial Bull N. P. 326; and where two issues were joined between the parties, both of which were found for the plaintiff: and, upon moving for a new trial, the judge before whom the cause was tried certified the verdict, as to one of the issues, to be contrary to evidence, but as to the other issue, certified it to be right, the Court of Common Pleas, upon hearing counsel on both sides, were of opinion that the verdict could not be reversed and being right in part, must stand; Barnes, 426.

‡ Where a plaintiff submits to an erroneous non-suit, a new trial shall be without costs; Pochin v. Pawley, 1 Black 70. There is no rule on giving costs on a new trial being granted, although the verdict was against the opinion of the judges; Gosley v. Batlow, 1 Anst. 47. A rule for a new trial, upon grounds not opened at the former trial, will be made absolute only on payment of costs; Sutton v. Mitchell, 1 T. R. 18.

§ The motion for a rule, to show cause why a verdict could not be set aside and a new trial granted, is made to the Court from which the venire issued. Afterwards, on showing cause, if the grounds upon which the rule was granted still seem sufficient, and either appear upon the face of the judge's report, or to be substantiated by affidavit and no sufficient cause be shown against it, the Court will make the rule absolute, and the Court will look only to the judge's report for the evidence given at the trial, and the manner in which the judge summed up the case, if that be stated in it, and will not attend to any contrary statement of him by counsel. The motion for the rule nisi must be made within four days after the distringas is returnable. 2 B. & A. 612; 1 Dougl. 171; 5 T. R. 437, unless under particular circumstances, 1 Dougl. 171; in which case the Court may in their discretion allow a new trial to be moved for at any time before judgment has been actually signed;

(g) *Of the costs.*

The costs are discretionary if a new trial be granted; in setting aside a nonsuit or verdict for misdirection of the judge, it is generally without costs.\*

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*BUSCALL v. HOGG.* M. T. 1770. C. P. 3 Wils. 146; Cowp. 297.

Trover for a great many goods to the value of 700*l.* Upon not guilty pleaded, this cause was tried at the last assizes for the county of Norfolk, before Lord Chief Baron Parker. Whereupon it appeared on the plaintiff's evidence, by seven witnesses, that Thickpenny was an innkeeper, and that he not only sold liquors to his guests (*hospitandibus*) in his inn, but also sold divers quantities of wine, rum, and brandy, by four, five, and six gallons at a time to several persons living two or three miles distant from his inn, for them to retail out and sell again, and had thus done for many years; whereupon it was insisted by the counsel for the plaintiff at the trial, that this sort of trading by the innkeeper made him liable to a commission of bankrupt; but the Chief Baron, without hearing any other evidence, was of a different opinion, and ordered the plaintiff to be nonsuited, with leave to move the Court for a new trial without costs, in case he was mistaken in his opinion; and now upon motion to set aside the nonsuit, the Court was clearly of opinion, that the plaintiff ought not to have been called, but the matter ought to have been more fully detailed and gone into at the trial; that it not appearing to the Court here what proportion Thickpenny's trade in his inn bore to his trading abroad and out of doors, they could not judge whether he was liable to be a bankrupt or not, and, therefore, they set aside the nonsuit, and granted a new trial without costs. It was said by Wilmut, C. J., that if Thickpenny's trade and profits in his inn were much larger than his trade and profits abroad out of the inn, he should incline to think that he was not liable to be a bankrupt. If it should come out in evidence that Thickpenny got 600*l.* per annum in his inn, and not 600*l.* per annum by sending out and selling liquors abroad, he seemed clear in opinion that he could not be a bankrupt. However, as there was general evidence that he was a trader out of his inn, the plaintiff ought not to have been nonsuited.

2 Dougl. 797, 798; 5 T. R. 436; 1 Geo. 4 c. 87. s. 3. Nor can it in general be moved for after motion in arrest of judgment, 4 B. & C. 160; 2 Salk. 647; Bull. N. P. 326; nor after error brought by the party making the application, Tidd. 805; 1 B. & P. 109; and many affidavits to be made use of in moving for it must also be sworn within the four days above mentioned, unless the special permission of the Court to the contrary be obtained for that purpose; R. T. 5 Geo. 4. If made absolute, draw up the rule with the clerk of the rules, 8 Taunt. 711; and serve a copy on the plaintiff's attorney or agent; or, if made absolute upon payment of costs, get an appointment on the rule from the Master, and serve a copy of the rule and appointment. Where a plaintiff, after setting aside a nonsuit upon payment of costs, proceeded to a second trial without paying these costs, and obtained a verdict, the Court set aside the verdict, and gave the defendant leave to sign his judgment in the original action, unless the costs should be paid within ten days; 13 Easts, 185; Hullock, 401.

\* Where the verdict was set aside for the misconduct of the jury, the Court ordered the costs to abide the event of the second trial; 1 Stra. 642. If set aside because the verdict was contrary to law, or to the opinion or direction of the judge, a new trial is granted usually without costs, Hullock, 383; Cowp. 303; 1 W. Bl. 630; 3 T. R. 551; but if, because the verdict was contrary to evidence, or because of excessive damages, the new trial is usually granted on payment of costs; 12 Mod. 370; 1 Burr, 12. 393; 2 Id. 665. If a party, have obtained a verdict by trick, the Court will grant a new trial without costs; or perhaps, in very gross cases, they will oblige him to pay the costs; 1 Burr. 352; Hullock, 391. So, where a new trial was granted because the plaintiff had a material witness for the defendant concealed in his house, and prevented him from being served with a subpoena, it was granted without costs; Bul. N. P. 328. If the rule be silent as to costs, the costs of the first trial are never allowed, whatever be the event of the second; Hullock, 391; Doug. 430. 433. 483; 3 T. R. 503; 6 Id. 31; 6 T. R. 144; 10 East, 416; 9 East, 325; 1 B. & C. 100; 6 Id. 620; 4 D. & R. 129. But when, in such a case, the defendant, who had obtained the rule, instead of proceeding to a second trial, gave the plaintiff a cognovit, the Court held him liable to pay the costs of the trial; 2 B. & A. 317; 3 B. & A. 304. Where the costs are ordered to abide the event of the second trial, if the same party succeed in both trials he shall have the first as well as the second, 1 H. Bl. 641; 1 Bing. 393; but otherwise, the costs of the first shall not be allowed, T. R. 619; 2 N. R. 382; 1 East, 111; 1 B. & P. 566. By the event of the second, is meant the ultimate event of the cause; and therefore, if the verdict at the second trial be not set aside, and on the third trial the ultimate event be the same as upon the first trial, the party will be entitled to the costs of the first trial; 5 B. & A. 366. If a new trial be granted upon a ground not opened at the first trial, it will be upon payment of costs; 1 T. R. 20.



(h) *Of the new trial.\**(i) *Of the venire de novo.* See post, tit. *Venire de novo.*(j) *Of judgment non obstante veredicto.†*

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A new trial after conviction may be granted unless the crime be higher than a misdeameour.‡

## II. RELATIVE TO CRIMINAL PROCEEDINGS.‡

1. REX V. MAWBEY. E. T. 1795. K. B. 6 T. R. 619.

Per Lord Kenyon, C. J. A new trial after conviction on an indictment may be obtained, unless the crime be of a higher denomination than a misdeameour.

2. REX V. TEAL. T. T. 1812. K. B. 11 East, 307.

Indictment for a conspiracy. Motion for a new trial on the ground that improper evidence had been admitted on the part of the prosecution, and that other evidence tendered on the defendant's part had been improperly rejected. The Court inquired if all the defendants who had been connected were then in court; and being informed that Sarah Cumberland was not present, they said they could not entertain a motion for a new trial in her absence, of which, if granted, she must also have the benefit; because, if such a precedent were once established, the person most criminal might keep out of the way, and take the opinion of the Court by putting forward one of the other defendants who had been convicted.

On motion for a new trial in a criminal case all connected must be present.¶

## Trover. Action for.

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## I. RELATIVE TO FOR WHAT IT DOES, OR DOES NOT, LIE, p. 190.

## II. THE REQUISITES TO MAINTAIN.

## (A) OF THE PLAINTIFF'S INTEREST IN THE THING CONVERTED.

\* The former Nisi Prius record will answer, unless the postea have been indorsed upon it, in which case you must make out a new Nisi Prius record; if you use the former record; the jurata must be altered in the same manner as when the cause is made a remanet, 1 *Ld. Raym.* 516; *Carth.* 498. Give notice of trial sue out jury process, and enter your cause for trial as in ordinary cases. The second verdict alone appears upon the postea; also upon the judgment roll no notice is taken of the first verdict, but the record proceeds as if the record verdict was the only one which was given; 2 *Saund.* 253. n. (n. 8.) If the plaintiff do not proceed to the second trial, the defendant may carry down the record by proviso, but he cannot do so until after the next term or assizes from that in which the new trial was granted; 5 *Taunt.* 557.

† Where the defence put upon the record is not a legal defence to the action in point of substance, and the defendant obtains a verdict, the Court upon motion, will give the plaintiff leave to sign judgment, notwithstanding the verdict provided the merits of the case be very clear. The judgment so signed is an interlocutory judgment, after which a writ of inquiry must be served out and executed, and final judgment signed as in ordinary cases, 3 *B. & B.* 293; or if the damages be not material, as if the action have been brought to try a right, a custom or the like, the Court will set aside the verdict, and enter a verdict for the plaintiff for nominal damages; 2 *T. R.* 7. 586; *Co.* 59. b. The motion is for a rule to show cause, which is afterwards made absolute or discharged in the usual way.

‡ As to the time of notice of, place of, putting off, and questions to be litigated, see ante, vol. x. from p. 514. to 519.

§ After the conviction of an offence less than felony the Court of King's Bench will in its discretion grant a new trial whenever it is manifestly conducive to the ends of justice. In strictness, the application ought to be made within the time limited in civil cases; but for the attainment of substantial justice, the Court will interpose after the regular time has elapsed; *Rex v. Waddington*, 1 *East*, 143. The rule that a new trial will not be granted in a criminal case where the defendant has been acquitted, *Rex v. Praed*, 4 *Barr.* 2257; *Leff.* 391. admits no exceptions, it applies to the case of an indictment for a nuisance; *Rex v. Mann*, 4 *M. & S.* 337. If in criminal proceedings some evidence be adduced which should have been excluded, and a verdict pass against the defendant, a new trial will be granted, since there are no means of ascertaining whether the other portion of evidence alone weighed with the jury, or whether they were not influenced by that improperly admitted; *Rex v. Sutton*, 4 *M. & S.* 532.

¶ The rule confining a motion for a new trial to the four first days of the term applies as well to criminal as to civil cases; but if, in the course of an address in mitigation of punishment or otherwise, it appears that justice has not been done, the Court will of themselves interpose, and grant a new trial; *Pulk v. Purvis*, 5 *T. R.* 432; and see *Rex v. Waddington*, 2 *East*, 143.

(a) Possession, p. 192. (b) Absolute property, p. 192. (c) Special property, p. 196.

(B) OF THE CONVERSION, p. 196.

III. \_\_\_\_\_ LY AND AGAINST WHOM MAINTAIN-  
ABLE, p. 198.

IV. \_\_\_\_\_ STAYING PROCEEDING, p. 200.

V. \_\_\_\_\_ THE PLEADINGS.

(A) DECLARATION, p. 201.

(B) PLEAS, p. 202.

VI. \_\_\_\_\_ EVIDENCE, p. 203.

VII. \_\_\_\_\_ JUDGMENT AND COSTS, p. 204.

Trover\*  
lies for an  
unstamped  
agreement  
if it can on  
payment of  
the penalty  
be stamp  
ed;†

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But it does  
not lie ‡ for  
it by action.  
The owner of a  
freehold house,  
in which there  
were various  
fixtures, sold  
the house was  
executed, and  
possession given  
to the purchaser,  
the fixtures still  
remaining in the  
house; it was  
held that they  
passed by conveyance  
of the freehold,  
and that even  
if they did not,  
the vendor, after  
giving up the  
possession, could  
not maintain trover  
for them. A few  
articles which were  
not fixtures were  
also left in the  
house; the demand  
described them,  
together with the  
other articles, as  
fixtures, and the  
refusal was of the  
fixtures demanded;  
it was held, that  
upon this evidence  
the plaintiff could  
not recover them  
in this action.

I. RELATIVE TO FOR WHAT IT DOES, OR DOES NOT, LIE.

1. SCOTT v. JONES. H. T. 1807. C. P. 4 Taunt. 865.

Trover to recover an unstamped agreement. The Court held it clearly sustainable if the instrument could, on payment of the penalty, be stamped.

2. COLEGRAVE v. DEOS SANTOS. M. T. 1823. K. B. 2 B. & C. 76.

The owner of a freehold house, in which there were various fixtures, sold it by action. Nothing was said about the fixtures, a conveyance of the house was executed, and possession given to the purchaser, the fixtures still remaining in the house; it was held that they passed by conveyance of the freehold, and that even if they did not, the vendor, after giving up the possession, could not maintain trover for them. A few articles which were not fixtures were also left in the house; the demand described them, together with the other articles, as fixtures, and the refusal was of the fixtures demanded; it was held, that upon this evidence the plaintiff could not recover them in this action.

\* Is a special action on the case to recover in damages the value of a personal chattel wrongfully possessed and converted by another to his own use, and not for the restoration of the thing itself in specie, which can only be recovered by action of detinue or replevin. The form is partly a fiction, which supposes in every case that the defendant might have come lawfully by the property; and, if he did not, yet by adopting this action the plaintiff waives the trespass, and cannot recover damages for the act of taking, as the injury wholly consists in the illegal conversion, which is the gist of the action.

† This remedy may be supported for money, though it be not in a bag, or otherwise distinguished from another coin, because the thing itself is not to be recovered in this action, but merely damages for the conversion; and where, upon a contract for the sale of an estate, the title and abstract was agreed to be prepared at the expense of the vendor, the purchaser is entitled to the custody of the abstract, until the purchase is finally rescinded by consent, or declared impracticable in a court of equity, and in the meanwhile he may maintain trover for it if delivered to the vendor for a special purpose, and not returned. When the contract is rescinded, the abstract becomes the property of the vendor; if the sale is completed it is the property of the vendor. Trover lies by the assignees of a bankrupt against a sheriff for taking the goods of the bankrupt in execution, after an act of bankruptcy, though before the issuing of the commission where he sells after the issuing of the commission, and has notice from the provisional assignee not to sell; and if money has been paid by a debtor in anticipation of bankruptcy by way of fraudulent preference, the assignees should proceed in trover, and not by action of assumpsit for money had and received; because by adopting the latter form, they would enable the defendant to avail himself of his original debt as a set-off. If A. sells an estate to B., who pays part of the purchase money, and the title deeds are deposited with C., to be delivered up to B. when he pays the residue, A. gets re-possession of the deed and pledges them to D. for a valuable consideration. B., on tendering the remainder of the purchase money, is entitled to recover them from D. And where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored which he promised not to do, but afterwards delivered them to the wharfinger for the owner's use, under the idea of the wharfinger having a lien thereon for the wharfage fees, because the vessel was unloaded against the wharf, it was decided that the owner, upon demand and denial, might support trover against the captain, unless the latter could establish the wharfinger's right. If goods be obtained from A. by fraud, and pawned to B. without notice, and A. prosecute the offender to conviction, and get possession of his goods, B. may maintain trover for them, because these circumstances are distinguishable from a case of felony, where the owner's right of restitution is given by positive statutes.

‡ This action is, from its nature, exclusively confined to the conversion of personal

## II. RELATIVE TO THE REQUISITES TO MAINTAIN.

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## (A) OF THE PLAINTIFF'S INTEREST IN THE THING CONVERTED.

(a) *possession.*

## 1. GORDEN v. HARPER. M. T. 1796. K. B. 7 T. R. 9.

A person leased a house with the furniture therein to another for a certain time, and during the term the furniture was taken in execution by the sheriff, at the suit of J. T. against a person to whom the furniture formerly belonged. It was holden that the landlord could not maintain trover against the sheriff for the value of the furniture, because the plaintiff has no a right of possession during the demise; the tenant's property and interest did not determine by the sheriff's trespass; the tenant might have maintained trespass against the wrong doer, and recovered damages.

The plaintiff must have the right of possession and a right of property to sustain this action.

## 2. HUDSON v. HUDSON. Latch. 214. Cited 7 T. R. 13.

In trover. The plaintiff, as executor, declared upon the possession of his testator; it was holden to be sufficient, because the personal property of the testator was vested in the executor; and no other person having a right to the possession, the property drew after it the possession in law.

Though the right of possession is sufficient without having had actual possession.\*

(b) *Of the absolute property.*

## 1. PYNE v. DOR. 1 T. R. 55. S. P. WEBB v. FOX. M. T. 1797. K. B. 7 T. R. 398.

Trover was brought by a tenant in tail expectant on the determination of an estate for life, without impeachment of waste, for timber which grew upon and had been severed from the estate, and was in the possession of the defendant. It was holden that the plaintiff could not recover, because an action of trover must be founded on the plaintiff; and in this case the plaintiff had not any property in the timber; for a tenant for life without impeachment of waste has a right to the trees at the moment when they are cut down; he having the possession of goods; has also the exclusive right to enjoy them, and which can only be defeated by his own act.

An absolute property in goods is where one having the possession has also the exclusive right to enjoy them, which can

chattels, and is not applicable to the redress of injuries to land or other real property, even though a part be severed from the freehold, unless, after the severance, there be also an asportation, as in the case of an unlawful removal and conversion of coals or trees, trover may then be supported, but it is not sustainable by an incoming tenant to recover the value of away-going crops taken by the off-going tenant. Trover will not lie for goods irregularly sold under a distress, the stat. 11 Geo. 2. c. 19. s. 19. having declared that the party selling should not be deemed a trespasser *ab initio*, independent of its having given an action on the case to the party grieved by such sale; but if a person pay money in order to redeem his property from a wrongful distress for rent, he may then maintain trover against the wrong-doer. Where goods were pawned to a broker for a certain sum, and usurious interest agreed to be paid thereupon, the pawner of the goods cannot maintain an action of trover for them in order to divest himself of the usurious contract, without first tendering the money which had been actually advanced, and legal interest; nor can it be supported by a party to a suit for the conversion of a record, because such a document is not private property; though it may for a copy, which is private property.

\* For it is an admitted principle of law that general property in a personal chattel creates a constructive possession; as an executor or administrator is by legal construction possessed of the property of the testator or intestate from the time of his death, and where a person has delivered goods to a carrier or other bailee, who is not entitled to withhold them from the general owner, the latter, although he has just parted with the actual possession, may, notwithstanding, maintain trover for a conversion by a stranger; for the owner has still the possession in law against a wrong-doer, and the carrier or other bailee is considered merely as his servant. It is not requisite in the case of special property, where the party has likewise an interest in the goods, that it should have been accompanied by actual possession; for a factor, to whom goods have been consigned, and who has never received them, may support an action of trover.

† As if goods are sold to be paid for within a limited period, and under an arrangement, that if they are not removed at the end of that time, that warehouse rent shall be paid for them, the property in the goods is vested absolutely in the purchaser from the day of sale, but trover cannot be maintained by a tenant in tail expectant on the determination of an estate for life without impeachment of waste for timber, which grew up, and was severed from the estate, and was in possession of the defendant; because a tenant for life, without impeachment of waste, has a right to the trees at the moment when they are cut down; 1 T. R. 55.

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Therefore, trover will not lie for goods awarded to be delivered to the plaintiff.

## 2. HUNTER v RICE. M. T. 1914. K. B. 15 East, 100.

An arbitrator, to whom all matters in difference between a landlord and tenant had been referred, awarded that a stack of hay should be delivered up by the tenant to the landlord on being paid a certain sum for it. The landlord tendered the money, but the tenant refused to receive it, or to deliver up the hay; wherefore the landlord brought trover against the tenant for the hay. It was holden that this action could not be maintained, for the property was not transferred by the mere force of the award, and that the landlord's only remedy was to proceed against the tenant upon the award; but

Lord Ellenborough observed that the case might have been different if the tenant had accepted the money tendered: for that would have been a ratification of the award, and an assent on the part of the tenant to the transfer of the property.

## 3. HANSEN v. MYER. E. T. 1807. K. B. 6 East, 614.

In fact, it cannot be sustained unless there is a perfect and complete right of property in the plaintiff.

The plaintiff purchased of the defendant a quantity of starch, which was lying at a warehouse of a third person, at so much per hundred weight, by bill at two months, for the delivery of which fourteen days were to be allowed. The weight not having been ascertained at the time of purchase, the defendant gave, according to the usual mode, a note to the warehouse-keeper, to weigh and deliver all his (the defendant's) starch. By virtue of this order a partial weighing and delivery of several quantities of the starch took place. Trover having been brought for the remainder, which was unweighed and not delivered, it was holden that the action could not be supported, although it was contended, on the part of the plaintiff, that a delivery of part of an entire quantity of goods contracted for was a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole, although the price for the same should not have been paid.

*Per Cur.* Without deciding what might be the legal effect of such part delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property: in this case another act was necessary to precede both payment of price and delivery of the goods bargained for, viz. weighing. Until the starch was weighed, the warehouse-keeper, as agent of the defendant, was not authorized to deliver it, still less was the buyer authorized to take it by his own act from the warehouse; and if he could not take it, neither can he maintain an action of trover founded on such a supposed right to take, or, in other words, founded on such supposed right of property in the subject-matter of this action.

## 4. RAGG v. MINETT. H. T. 1812. K. B. 11 East, 210.

As, where in the case of vendor and vendee every thing has been done by the sellers which they contracted to do.

Turpentine in casks was sold by auction at so much per hundred weight, and the casks were to be taken at a certain marked quantity, except the two last, out of which the seller was to fill up the rest before they were delivered to the purchasers; on which account the two last casks were to be sold at uncertain quantities; and a deposit was to be paid by the buyers at the time of the sale, and the remainder within thirty days on the goods being delivered;

\* Where plaintiff had exchanged a horse with defendant, and gave possession of him it was holden that, though the exchange might have been unfair, yet trover would not lie, as the plaintiff's property in the animal was divested by the exchange; Cowp. 819. When the right of property in the plaintiff is not complete and perfected, this action is not sustainable; hence, under a contract of sale, whereby the vendee agreed to purchase all the starch of the vendor then lying at the warehouse of a third person, at so much per cwt. by bill at two months, which starch was in papers, but the exact weight not then ascertained; but was to be afterwards computed, and fourteen days were to be allowed for the delivery, and the vendor gave a note to the vendee addressed to the warehouse keeper, directing him to weigh and deliver to the vendee; it was determined that under this contract the absolute property in the goods did not vest in the vendee before the weighing which was to precede the delivery, 6 East, 614; though, if every thing contracted to be performed by the vendor is completed, the property in the goods is vested immediately in the vendee, notwithstanding they may still continue in the possession of the vendor; 11 East, 210. If a person contract with another for a chattel which is not in existence at the time of the contract, though he pays the whole value in advance, and the other proceed to execute the order, the buyer acquires no property in the chattel until it is finished and delivered to him, and therefore trover cannot be maintained for it.

and the buyers had the option of keeping the goods in the warehouse at the charge of the seller for those thirty days, after which they were to pay the rent; and the buyers, having employed the warehouseman of the seller as their agent, he filled up some of the casks out of the two last, but left the bungs out, in order to enable the Custom-house officer to gauge then; but, before he could fill them, a fire consumed the whole in the warehouse within the thirty days. It was holden that the property passed to the buyers in all the casks which were filled up, because nothing further was to be done to them by the seller; for it was the business of the buyers to get them gauged, without which they could not be removed; and the act of the warehouseman in leaving them unbunged after filling them up, which was for the purpose of the gauging, must be taken to have been done as agent for the buyers, whose concern the gauging was. But the property in the casks not filled up remained in the seller, at whose risk they continued.

(c) *Of special property.*

1. *ARMORY v. DELMAINE.* H. T. 1721. K. B. 1 Stra. 505.

A chimney-sweeper's boy found a jewel, carried it to a goldsmith's to ascertain its value, who, on its being delivered to him for that purpose, refused to return it. It was holden that, though the boy did not, by such finding, acquire an absolute property, yet he had such a property as would enable him to retain it against all persons except the rightful owner.

A bare possession may constitute a sufficient special property [ 195 ] to support this action against a stranger.

2. *SUTTON v. BUCK.* E. T. 1808. C. P. 2 Taunt. 302.

The plaintiff bought and paid for a ship stranded on the coast, but did not comply with the regulation of the register acts: he endeavoured for several days to get the ship off, but without success; at length she went to pieces. The defendant having possessed himself of parts of the wreck which had drifted on his farm, it was holden that the plaintiff had property in him to enable him to maintain trover against a wrong-doer; for, as far as regarded the possession of the plaintiff, it was good against all except the vendor; and although the plaintiff had no absolute property as against the vendor, yet he claimed under him, and had the possession against those who tortiously took the goods without colour of right.

Hence possession under the rightful owner is sufficient against a person having no colour of right.

3. *ROBERTS v. WYATT.* H. T. 1808. C. P. 2 Taunt. 268.

Defendant having agreed to sell the plaintiff an estate, with the usual proviso, that, in case the vendor could not make a title, the contract should be void, delivered to the plaintiff an abstract of the title. The plaintiff laid this abstract before counsel, and having received it back with an opinion written at the foot, and several queries in the margin, he left it with the defendant, requesting him to copy the the opinion and marginal observations, and return the abstract as soon as he had copied them. After the plaintiff had several times in vain applied to have the abstract returned, at length he made a formal demand of it, when the defendant refused to re-deliver it, observing that, as he had been enable to clear up the objections of the plaintiff's counsel, the abstract would be useless to the plaintiff. The plaintiff having brought an action of trover for the abstract, it was holden that he was entitled to recover,

And a mere temporary property has been deemed sufficient.

Chambre, J., observing, that as to the general property in the abstract, while the contract is open, it is neither in the vendor nor in the vendee absolutely; but, if the sale goes on, it is the property of the vendee; if the sale is broken off, it is the property of the vendor. In the mean time the vendee has a temporary property, and a right to keep it, even if the title be rejected, until the dispute be finally settled for his own justification, in order to show

\* A party having a special property only in a personal chattel may support trover against a stranger who takes it out of his actual possession as a sheriff, factor, consignee, pawnnee, trustee, bailee, agister of cattle, or other person who is responsible, over to his principal, or by a person who is entitled to the temporal custody of a chattel, and delivers it back to the general owner for an especial purpose, may after that purpose is satisfied, and during his temporary right, support this action, 2 Taunt. 268; or by a lord who seizes an estray or wreck against a stranger before the expiration of a year and a day; and so, if a house demised for a term be blown down, the lessee may have trover for the timber, though the property be in the reversioner.

[ 196 ] on what ground he did reject the title. A person leased a house with furniture to another for a certain time, and during the term the furniture was taken in execution by the sheriff at the suit of J. S., against a person to whom the furniture formerly belonged: it was holden that the landlord could not maintain trover against the sheriff for the value of the furniture, because the plaintiff had not the right of possession during the demise; the tenant's property and interest did not determine by the sheriff's trespass; the tenant might have maintained trespass against the wrong-doer, and recovered damages.

Assuming a dominion over property without right is a conversion.

[ 197 ] Hence drawing out part of the liquor in a vessel and filling it up with water is a conversion; So, the taking property by assignment from one who has no power to transfer is a conversion;

(B) OF THE CONVERSION.\*

1. SAIPWICK V. BLANCHARD. E. T. 1795. K. B. 6 T. R. 298.

*Per Cur.* There is no occasion for a party to take possession of goods by laying his hands upon them; if he claim and assert a dominion over them, especially by turning the possession of them to his own profit, that is a sufficient possession in law to subject the wrong-doer to an action of trover.

2. RICHARDSON V. ATKINSON. M. T. 1723. K. B. 1 Stra. 576.

The Court held, that the drawing out part of a vessel and filling it up with water was a conversion to all the liquor, and the jury gave damages as to the whole.

\* 2. M'CARNE V. DAVIES. E. T. 1807. K. B. 6 East, 538.

A tobacco broker purchased in his own name for the plaintiff some tobacco which was in the king's warehouse, and afterwards pledged the same in his own name with the defendant with a sum of money, and transferred it into the defendant's name in the king's warehouse. The defendant was informed of the plaintiff's right to the tobacco, and was applied to both by the plaintiff and the broker to deliver the same to the plaintiff; but the defendant refused to make the transfer, or to give an order for the delivery. It was holden that the acts of the defendant amounted to a conversion.

\* A conversion, we have already seen, is essential to the support of this action; and, when the taking is tortious, a previous demand of the chattel and refusal is unnecessary; nor is it necessary that the property should be converted by the defendant to his own use, for trover may be supported against a servant, or agent, or other person, who unlawfully appropriates a chattel to the benefit or use of another. In general, whenever trespass will lie for the tortious assumption of another person's property, trover may be considered as a concurrent remedy; for a tort may be qualified though it cannot be increased, as if goods be wrongfully distrained, though they be not removed from the place in which they were, yet this action is sustainable, because the possession in a legal point of view is changed by their being seized as a distress; but, unless there be an illegal detention of property, trover cannot in general be supported for a mere omission or nonfeasance; hence, if a carrier by negligence lose goods intrusted to his care, the remedy must be an action on the case, and not trover; but if a banker after notice discounts a bill of exchange drawn on a customer and by the acceptance made payable at his bank, after notice that it had been lost by the holder, and afterwards debits his customer with the amount of the bill, writes a discharge on it, and delivers it up to the customer as the banker's voucher of his account, the latter thereby becomes guilty of a conversion, and the loser of the bill may recover in trover without a previous demand of the bill. If a person illegally make use of a thing found, by, or delivered to him, or intrusted to his care, it is a conversion in itself; as, where a wharfinger or carrier misuse a chattel intrusted to him, or by mistake deliver it to a wrong person, trover may be supported, though it would have been otherwise had they been lost by accident. If there have been a conversion, this action lies, although the property converted be ultimately restored, as if A. take the horse of B. and ride him, and afterwards return him to B., yet B. may support trover against A., for the riding constitutes a conversion, and the re-delivery will only go in mitigation of damages. In most of the preceding instances the act of the defendant has been a direct assumption of the property of another; but, where that is not the case, trover is not sustainable, as where goods had been delivered to a manufacturer in order that he might do something to them in the course of his business, and then return them; if the manufacturer upon being applied to for the goods makes merely excuses for not delivering them, and does not absolutely refuse to return the article, trover will not lie, the only remedy being an action of assumpsit for the non-performance of the contract; and wherever the taking be not tortious, or at least a neglect to deliver the property, as if a trader on the eve of bankruptcy make a collusive sale of his goods to A. the assignees cannot maintain trover without a previous demand and refusal though such a demand and non-compliance will be *prima facie* evidence of a conversion,

## 4. STEPHENS v. ELWALL. E. T. 1816. K. B. 4 M. &amp; S. 250.

Goods, the property of the plaintiff, had been by the servant of an insurance company carried to a warehouse of which the defendant, a servant of the company kept the key; and the defendant, on being applied to by the plaintiff to deliver them up, refused to do so without an order from the company. It was holden that this was such a refusal as amounted to a conversion of the goods by the defendant.

And a servant may be guilty of a conversion though done for the benefit of his master.

## 5. HARTOP v. HOARE. E. T. 1743. K. B. 1 Wils. 8.

Trover for certain jewels. Upon not guilty, a special verdict was found; viz. the plaintiff being owner of the goods in the declaration, January 12, 1729, inclosed them in a paper sealed up, and also sealed them up in a bag with his own seal, and in that manner sealed up, lodged them with one Seymour, a jeweller and banker in Fleet-street, for safe custody only, from whose servant the plaintiff took a receipt, acknowledging the receipt of the said jewels for the use of his master, Seymour, to keep them for the plaintiff, and to re-deliver them to him, on demand, so sealed up as aforesaid: that Seymour, without the knowledge, privity, or consent of the plaintiff, broke the seal and carried the jewels to defendant's shop, who are also jewellers and bankers in Fleet-street, in the city of London, and traded in jewels; and in the open shop pledged them as his own property for 300*l.*, and also gave a note of his hand for the money without any authority from the plaintiff to sell or dispose of them; that the defendants have converted them to their own use; that Seymour continued in possession of the said jewels till the time he pledged them that Seymour afterwards became a bankrupt, and plaintiff brought this action for the jewels in the Common Pleas; and upon this special verdict judgment was there given for the defendants; but now, upon error brought, the Court gave judgment for the plaintiff.

Advancing money may be longed to another is a conversion.

## 6. HOARE v. PARKER. E. T. 1788. K. B. 2 T. R. 376.

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In an action of trover for plate. It appeared that the plaintiff claimed under a remainder-man against the defendant, to whom it was pawned by the tenant for life; that J. S., by his will, gave his plate to trustees for the use of his wife *durante viduitate*, requiring her to sign an inventory, which she did at the time the plate was delivered into her possession. She afterwards pawned it with the defendant for a valuable consideration, who had no notice of the settlement, and before the commencement of this action she died. A demand and refusal was proved. After a verdict for plaintiff, the Court were of opinion, on a case reserved, that the defendant was bound to deliver up the plate without being paid the money he had advanced on it, observing that the point was clearly established, and the law must remain as it is until the legislature thought fit to provide that the possession of such chattels shall be a proof of ownership.

And where goods are illegally procured, trover lies without tendering the sum advanced.

## III. RELATIVE TO BY, AND AGAINST, WHOM MAINTAINABLE.\*

## 1. BROWN v. HEDGES. P. T. 1706. K. B. Salk. 290.

It was resolved by the Court, that one joint tenant, or tenant in common, or parcener, cannot bring trover against another, because the possession of one is the possession of both. If he does, it is good evidence on not guilty. But if one joint tenant brings trover against a stranger, in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence; 2 Lev. 113; Cro. Eliz. 514.

One joint tenant or tenant in common cannot support trover against his co-tenant.

\* After an act of bankruptcy committed by one partner he delivers goods of their joint property to a creditor for joint debt, and dies afterwards a commission issues against the surviving partner; it was determined that the creditor, by virtue of such delivery by the solvent partner, became tenant in common of the goods of the assignees of the bankrupt by relation from the act of bankruptcy, which was in the life-time of the solvent partner, and, consequently, that the assignees cannot maintain trover against such creditor: 1 East, 363. 368. If one joint tenant, &c. institute this action against a stranger, without his companion, the defendant cannot give the joint tenancy in evidence under the general issue, but must plead in abatement; nor can the plaintiff in such a case recover more than his own

## 2. HOLBDAY v. CAMSELL. E. T. 1787. K. B. 1 T. R. 658.

Therefore it lies not against a member of an amicable society for the box containing the funds entrusted to his care; [ 199 ] A member of an amicable society, who had been entrusted with a box containing the money subscribed, and was bound by bond to keep it safely, brought trover against B., another member of the same society, and a stranger, in a case where B. had got possession of the box, and carried it away and delivered it to the stranger.

Buller, J., observed that, it was admitted that one of the defendants was a member of this society, and consequently had a general property in the box, that a special property could not give a right in this action against a general property. The custody only was committed to the plaintiff, the property remained in the society.

## 3. BARNARDISTON v. CHAPMAN. Cited 4 East. 121.

Unless such tenant in common destroy the property, It appeared that one tenant in common of a ship had forcibly taken it out of the possession of his companion, and secreted it from him; so that he knew not where it was carried, and changed the name, and it afterwards got into the possession of a third person, who sent it on a foreign voyage, where it was lost.

Lord King, C. J., left it to the jury, whether, under the circumstances, the destruction was not by the defendant's (the tenant in common) means; and the jury finding it in the affirmative, the Court on motion for a new trial, approving of the Chief Justice's direction, refused to set aside the verdict.

## 4. FENNING v. GRENVILLE. H. T. 1807. C. P. 1 Taunt. 241.

Absolutely. One of two tenants in common of a whale cut it up and expressed the oil; it was holden, that such alteration in the form of the property did not amount to a tortious conversion so as to enable the companion to maintain trover for the act done was an application of the whale to the only purpose which could make it profitable to the owners, and tended to preserve it, instead of destroying it, which one tenant in common was clearly entitled to do; and, as the parties were clearly tenants in common of the whale, they became tenants in common of the produce after it was converted into oil.

## 5. WEST v. PASMORE. Bull. N. P. 35.

However, the preceding rule only holds where the law considers the possession of one to be the possession of both.\* A. is tenant in fee of one-fourth part of an estate, and B. tenant in common with him of the other three parts, for a term of years, without impeachment of waste. A. cut down trees, and B. took them away. A brought trover. The Court held it maintainable; for, though B. being disinclined of waste, might cut down what trees he would, yet trees having an inheritable quality, and B. not having any interest in the inheritance, he cannot take the trees when felled by him who has the inheritance, and consequently his possession being tortious cannot be said to be the possession of the other.

## 6. HOPKINSON v. GIBSON. H. T. 1815. 2 Smith, 202.

But trover does not lie [ 200 ] Trover to try a right to demand toll at a turnpike on the Kent Road, for certain horses which were sent by the plaintiff to Woolwich, as it was said, for the service of his Majesty, and which, therefore, it was contended, were by the last Mutiny Act exempted from toll. The facts were as follows: Colonel Hopkinson, the plaintiff, was employed by the Ordnance Board to purchase horses for the Royal Hospital Artillery at Woolwich. On the 15th of October, 1803, he purchased ten horses of a dealer; who were taken to Privy Gardens, there to be approved of by the officer of the Board of Ordnance for government. Colonel Hopkinson then ordered the horses to be taken by some artillerymen, under the conduct of one Harriots, a serjeant or corporal, share in the property; 2 Lev. 113. Trover will not lie against an executor or administrator for a conversion of goods by his testator or intestate, Cowp. 371; though, if the property came to the possession of the former in specie, trover would be maintainable against them, though not in their representative character; Cowp. 374. In the case of trover before marriage, and conversion of the property of the wife during it, the husband and wife may join or sever, Salk. 114; and when a woman converts goods anterior or during their marriage without her husband, they should be jointly sued, 2 Saund. 47. n.; and, for a conversion by husband and wife jointly, the action may be brought against him alone.

\* And if A., having received a bag of dollars, with directions to pay over a certain number to B., appropriate the whole, he is liable to B. in trover; Jackson v —, 4 Taunt. 24.



to Woolwich. Upon coming to the gate he was stopped, and one of his horses was taken by way of a distress for the toll, he not being prepared to pay it. He showed the turnpike man his roll. He then proceeded to Woolwich, where he delivered the rest of the horses to one Colonel Close, and obtained of him a note to demand the horse which had been seized. The gate keeper refused to deliver it, stating that it was taken in order to try the right. At the trial, the taking the horse as a distress was admitted. The only question was to try the fact, whether they were the horses of government, or in the service of his Majesty; in either of which cases, they would be exempt from toll by the 55th section of the Mutiny Act, for the year 1803. On the part of the defendant, no evidence was called, but it was contended that either the horses were not the property of his Majesty, or in the employment of government; or that, if they were, Colonel Hopkinson had no property in the horse in question, so as to entitle him to maintain an action of trover in his own name. The learned judge told the jury they were bound to find a verdict for the plaintiff if the horses were in the employment of government; if otherwise, they must find for the defendant. The jury accordingly found a verdict for the plaintiff. Lord Ellenborough, C. J. How can you make a special property in Colonel Hopkinson? The property is in the crown, Colonel Hopkinson was merely an agent. He advanced the money for the purchase of the horse for government merely; he might have an indictment for the crown, or there may be an action of trover perhaps brought by the person who had the actual custody of the horse at the time. He may now, as far as we know, have filed an indictment. Rule absolute. New trial granted.

7. *YARBOROUGH v. BANK OF ENGLAND.* T. T. 1816. K. B. 16 East, 6.

Per Lord Ellenborough, C. J. Where certain persons in a corporate body can competently do, or order any act to be done, on their behalf which as by their common seals they may do, they are liable to the consequences of such act, if it be of a tortious nature, and to the prejudice of others, hence trover lies against them.

#### IV. RELATIVE TO STAYING PROCEEDINGS.

1. *ANON. H. T. 1718.* K. B. 1 Stra. 142.

In trover for money. The Court said the sum for which the action is brought may be brought into court.

2. *WHITTEN v. FULLER.* E. T. 1701. K. B. 2 Bla. 902. *FISHER v. PRICE.*

T. T. 1792. K. B. 3 Burr. 1363.

Trover for a bond of 400*l.* given by T. W. father of the plaintiff A., as part of her portion to J. H. who was her first husband, and which bond was alleged to be given in trust for the purchase of an estate to be settled to the use of the marriages. On H.'s death, in 1762, A. took out administration, and deposited this bond in the hands of the defendant, her proctor. She afterwards married the plaintiff, John Whitten, in 1766, who turned her out of doors in two months, and demanded this bond of Fuller. On the other hand, the wife and her father, her obligor, forbade him to part with it, and filed an injunction bill in 1767, to prevent the plaintiff from suing the defendant, and the defendant from delivering it up. Thus it rested till after the death of Woodward, the obligor, in 1769, and his widow, in 1771, whereby the plaintiff A. became entitled to an annuity for her life of 136*l.* 10*s.* per annum. Whereupon the plaintiff, Whitten took her home again, and again demanded his bond of the defendant, who was advised not to part with it, unless called upon in a legal way. Upon which the plaintiff brought this action in the name of his wife and himself. And it was now moved for the defendant, that on delivering up this bond and payment of costs all proceedings might stay. And by

De Grey, C. J., and *tot. Cur.* Though this, upon the circumstances

\* But the proceedings cannot be stayed in those cases where there is an uncertainty, either as to the quantity or quality of the thing demanded, or there is any tort that may enhance the damages above the real value, and where the circumstances of the case will afford no criterion how to estimate the additional damages.

Trover lies against a corporation

In trover for money, it may be brought in to court.

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And where the chattel is specific, the value and quantity are ascertained, and there are no grounds for damages beyond the chattel itself may be.

disclosed, seems to be an unfavourable case, yet we cannot stay proceedings on delivering up the bond if the plaintiff insists upon going for special damages.

## V. RELATIVE TO THE PLEADINGS.

### (A) DECLARATION.

Cock v. ——— H. T. 1800. K. B. Cited 2 Selw. N. P. 1350. 6th Edit.

The declaration must carefully state the possession to be in the person to whom the property belongs.

In an action of trover by the assignee of bankrupt partners, the declaration consisted of one count only, in which the possession was stated to be in the partners. It appeared in evidence that the greater part of the goods in question belonged to one of the partners only, before the commencement of the partnership, and had never been brought into the partnership fund. It was proved that the residue of the goods was part of the joint estate.

Per Lord Kenyon, C. J. The plaintiff under this declaration is entitled to recover the value of such goods only as have been proved to belong to both the partners, as partners. Had there been a count in the declaration stating the possession in the assignees, as this was a joint commission, and the assignment under such commission passes both separate and joint effects, the whole might have been recovered. As it is, the verdict must be for that only which has been proved to be the property of the partners. The jury found a verdict accordingly.

### (B) PLEA.†

WORTLEY v. MONTAGUE. Cited 1 Taunt. 577.

In trover, the statute of limitations runs from the conversion.

An executor, several years before, had left some household stuff in the house, by the consent of the heir, who used them afterwards, and within six years of the action brought, the executor demanded the goods, and the heir refused to deliver them: whereon trover was brought, and the statute of limitations pleaded. It was holden that the use before the demand was neither a conversion nor any evidence of it; for it was with the consent of the executor until that time, and the demand being within six years, the refusal which ensued it, and which was the only evidence of a conversion in the case, was within the six years; and if a trover be before the six years, and a conversion after, the statute cannot be pleaded.

\* This action is transitory, and the conversion may be laid in any county. The declaration succinctly alleges that the plaintiff was possessed of the chattel for the recovery of which the action is brought; as, of his proper goods, which should be described with convenient certainty, though the same precision in specifying their nature, quantity, and quality, is not so essential as formerly; for it has been holden sufficient, when the declaration only described the goods as one parcel of packcloth, without setting out the exact quantity and other particulars; or, if it be for the recovery of a bond or other instrument, the date need not be stated. As the conversion is the gist of the action, it must of necessity be positively alleged; but the manner in which the goods came to the possession of the defendant is only inducement; consequently, the plaintiff may declare that they came to the hands of the defendant generally or specially, by finding which latter allegation is not traversable, although the defendant became possessed of the goods by delivery, or acquired them by fraud and collusion. In trover by baron and feme, the declaration should not allege property in them both or conclude to their joint damage; for the whole of the wife's interest in the chattel on the marriage is transferred to the husband; and, consistently with the same principle, if an action be brought against them, the conversion must be alleged to the use of the husband, and not to them on their joint use. An executor may declare in that capacity on his constructive possession though in fact he never may have had it; but the declaration must state the period of the conversion, that is, whether in his own time or in that of his testator.

† The general issue is, "Not guilty," which is the only plea usually adopted in this action, as the defendant under it may give in evidence every fact tending to establish the legality of the supposed wrongful conversion. However, the defendant is at liberty to plead any matter which admits the conversion and property to be in the plaintiff, but justifies the former: as, in trover for a dog, defendant may state that A. was seized in fee, and was lord of a certain manor, and that he was duly appointed his game-keeper, and that a certain person not qualified by law was using the animal for the destruction of game; wherefore, the defendant took him, &c.; or the defendant may plead a release, or the statute of limitations, or a former recovery, &c., though the bankruptcy of the defendant should be given in evidence under the general issue. The most usual defence to this action is, that the defendant has a lien on the goods, or a right to detain them. As to the law on this subject, see ante, tit. Lien.

## VI. RELATIVE TO THE EVIDENCE.

## 1. ANON. Bull. N. P. 33.

*Per Cur.* To support trover, evidence must be produced to establish plaintiff's right of property and possession.

## 2. ANON. 1707. Bull. N. P. 37.

*Per Holt, C. J.* In trover for a debenture, the plaintiff must prove the number of the debenture, as laid in the declaration, and the exact sum to a farthing, or he will be nonsuited. But he need not set out the number any more than the date of a bond, for which trover is brought, for the plaintiff not being possessed of the debenture may not know the number; and if he should mistake in the number, he must fail in the action. *See tit. Variance.*

## 3. PALLISON v. ROBINSON. T. T. 1817. K. B. 5 M. &amp; S. 105.

Plaintiff sold goods to F. who paid for them, and who was to take them away; but defendant becoming possessed of the place in which the goods were deposited, plaintiff's attorney accompanied by F. demanded them of the defendant, telling him that they belonged to plaintiff, and that they had sold them to F.; to which defendant answered that he would not deliver them to any person whatsoever: and afterwards plaintiff repaid the money to F. and brought trover against defendant. It was holden, that this demand and refusal were sufficient evidence of a conversion to support the action, and that a new demand by the plaintiff after he had repaid the money to F. was not necessary.

## 4. NICOLL v. GLENNIE. M. T. 1812. K. B. 1 M. &amp; S. 588.

Plaintiff brought trover for goods against A. and B., bankrupts, and C. and D., their assignees, and proved that the bankrupts before the bankruptcy received and afterwards disposed of the goods by way of pledge, having no authority so to do; and that the assignees, after the bankruptcy, took possession of the goods and refused to deliver them to the plaintiff on demand; and the jury found all the defendants guilty. There being only one count in the declaration, held that the evidence did not warrant such finding. In trover against several defendants, all cannot be found guilty on the same count without proof of a joint conversion by all.

## VII. RELATIVE TO THE JUDGMENT AND COSTS. §

**Trustees.** See *post*, tit. *Turnpike*.

## I. RELATIVE TO TRUSTEES AND CESTUI QUE TRUST IN GENERAL, p. 204.

## II. THE MODE OF CREATING THE RELATIVE SITUATIONS OF TRUSTEE AND CESTUI QUE TRUST, p. 211.

\* In order to enable the plaintiff to support this action he must establish either an absolute property in the goods and right of immediate possession at the time of the conversion, or else that he has a special property in them, which renders him responsible over to the right owner; he must likewise prove possession to have been in defendant, and a conversion by him, which is, in general, the only requisite evidence, as the plaintiff need not substantiate the fictitious and formal part of the action.

† In trover for a ship the mere fact of possession as owner is sufficient *prima facie* evidence of ownership, without the aid of any documentary proof of title, as the bill of sale, or ship's register, until such further evidence is rendered necessary in consequence of the addition of some contrary proof on the other side.

‡ To determine what evidence will be required to prove a conversion by the defendant, it must be ascertained, as a preparatory step, how the goods came into his possession, for if they came to his hands by delivery, finding, or bailment, an actual demand and refusal ought to be proved, 1 Sid. 164; 1 Stra. 576; Cro. Eliz. 219; though, if it appear that the defendant acquired possession of the goods by a tortious or illegal act, or that, being intrusted with the property, he actually converted it to his own use, in the former case it will not be necessary to prove a demand, as the wrongful taking of the goods is itself *prima facie* a conversion; Bul. N. P. 44; 2 Mod. 212.

§ The judgment in this action is for the recovery of a compensation in damages and full costs, to which the plaintiff is entitled, though he recover less than forty shillings. See 22 & 23 Car. 2 c. 9; 8 & 9 W. 3. c. 11.

- III. RELATIVE TO THE RIGHTS AT LAW OF TRUSTEE AND CESTUI QUE TRUST, p. 213.  
 IV. LIABILITIES AT LAW OF TRUSTEE AND CESTUI QUE TRUST, p. 215.  
 V. REMEDIES BY AND AGAINST TRUSTEES AND CESTUI QUE TRUST AT LAW, p. 216.

I. RELATIVE TO TRUSTEES AND CESTUI QUE TRUST IN GENERAL.\*

\* The rights, duties, and liabilities of a trustee, and the corresponding privileges and disabilities of a cestui que trust, are matters exclusively cognizable by courts of equity. The present note is, therefore, merely affixed as affording the common law student a very brief outline of this important and interesting subject:—

The subject of this note is one that has only lately formed a very prominent part of our juridical system. The ancient text writers never viewed or examined it apart from the doctrine of uses as applicable to real property. Every person, however, must be aware that, according to the present mode of making wills, settlements, and conveyances, the greater portion of the wealth of this country is vested in trustees; parties who possess the legal, but not the beneficial interest in the property.

[ 205 ] *Nature and different kinds of trustees.* With respect to the derivation and nature of the office of trustee, or rather the origin of uses, or the holding of the legal estate for the benefit of another, it seems that before the stat. 27 Hen. 8, c. 10, the simplicity of the common law admitted of no intermediate estate in lands; a legal seisin was indispensable. In the progress of time, a right to the rents and profits of lands, of which another person had the legal possession, was introduced; and though not recognized for a considerable period by the courts of common law, was, notwithstanding, supported by the equity tribunals. Such an interest or right was known by the name of a Use. The introduction of this novelty produced a progressive, but an entire revolution in the system of real property, and gave rise to a mode of transferring land widely different from that which the old law had established. A use was thus created: the owner of lands conveyed them by feoffment, with livery of seisin, or delivery of possession, to some friend; with a secret agreement that the feoffee should be seised of the property, to the use of the feoffor, the person making the grant, or of a third person. Thus the legal seisin was in one; and the use, or right to the rents and profits, in another. A use not being considered as equivalent to an estate in the land, was not an object of feudal tenure; it was exempt from all those oppressive burthens inseparable from that complicated system. But the cestui que use, or party for whose benefit the estate was holden, had no legal ownership of the land, and when in possession he was considered merely as a tenant by sufferance. He could not bring an action, avow, nor justify for damage feasant in his own name, his wife was not dowable, Peake, 349; and the husband of a feme cestui que use could not claim his courtesy, Ibid. 463, 1 Co. 123, b. But the feoffee to whom the land had been granted for the purpose of the use of the late owner of the property at law, having performed the feudal duties his wife was dowable, Bro. Feoff. Pl. 10; and his estate was subject to wardship, relief, and the other numerous feudal burthens. He had the power of selling the lands, and forfeited them for treason or felony. He might have brought actions, and have exercised every kind of ownership over the lands conveyed, Dy. 96; Jenk. 190; 1 Sand. 62. Such was the state of uses at the time when it was deemed expedient to pass the statute 27 Hen. 8, c. 10, commonly called the Statute of Uses, which enacts "that where any person shall be seised of any lands, to the use, confidence, or trust, of any other person or persons by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise, then, and in every such case, the persons having the use, confidence, or trust,

shall from thenceforth be deemed and adjudged in lawful seisin, estate, and possession, of and in the lands, in the same quality, manner, and form, as they had before in the use." It would, however, be foreign to the subject of the present note to enter into a dissertation upon the abstruse and extensive body of law which has arisen in consequence of the statute of 27 Hen. 8, c. 10, and which now forms one of the most important branches of the doctrine of real property. See post, tit. Uses. The word "trust," in its legal acceptation, comprehends all personal obligations for paying delivering, or performing any thing when the person reposing the trust has no security beyond the confidence he places in the faithfulness and integrity of the party entrusted.

*Persons who may, or may not be trustees.* On the introduction of trusts, as distinct from the ancient doctrine of uses, those only who could be seised to an use were considered to be capable of being trustees. But the modern doctrine of trusts differs in no respect so essentially from the system of uses, as it does with reference to the capacity or liability of persons to act as trustees, and whatever the rule may be in regard to uses, it is now established that the king, a body politic or corporate, a tenant in tail for life, or for years, or a husband for his wife, (although a married woman cannot be a trustee for her husband,) and, in fact, all persons capable of confidence and of possessing real or personal estate may hold it as trustees. In the creation of a trust, it is not only necessary that there should be a person seised in trust for some other person, but that there should be also a party capable of enjoying the use or trust itself, that is, there must be cestui que trust as well as a trustee. All persons capable of taking a conveyance of lands, including corporations, may acquire the trust, or equitable and beneficial interest in them. And a trust may be created for a non-existing person, although the trust does not arise until such object be in esse. But in general no one can be seised to an use for his own benefit, or be a trustee for himself.

*Different kinds of trusts, and how created.* Trusts may be distinguished as public or private, according to the purposes for which they are held. Public trusts are chiefly created by acts of parliament in favour of public institutions and charities. Private trusts arise from the various conveniences and necessities of mankind. These are far too numerous to be specially noticed. Trustees, whether for public or private purposes, become so either expressly, by appointment, or devolution by descent, or representations, which continues the express trust; or by that implication which arises where it would be inevitable to sustain any other character. An acceptance, or such a degree of interference with the trust property as can be construed into an acceptance of the trust, is also necessary to constitute a trustee. The trusts must be in their nature lawful, and generally must arise at the time of their creation, though they need not then be specifically enumerated. As uses were originally created, governed, and directed, at common law, by the intent of the owner, parol declarations, verbal creations, and unwritten alterations of them served to all intents and purposes as effectually to charge estates with trusts as any other more formal method. But public convenience soon pointed out, and experience demonstrated, the necessity of some more formal mode of appointing trustees and declaring trusts. The stat. of 29 Car. 2, c. 3, ss. 7, 8, and 9, expressly relate to trusts; section 7, enacts, that all declarations or creations of trust of any lands shall be manifested or proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will and testament, or else shall be utterly void. Section 8, provides, that where any conveyance shall be made of any lands by which a trust shall or may arise by the implication of law, or be transferred or extinguished by any act or operation of law, then such trust shall be of the like force and effect as the same would have been if the statute had not been passed. Section 9, directs, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise. It was doubted sometime after the passing this act, whether a resulting use or trust of a fine or recovery could be defeated by a subsequent dec-

laration. The act of 4 Anne, c. 16, s. 15, after reciting the existence of the difficulties, declares, "That all declarations or creations of trust of any fines or common recoveries of any lands manifested and proved, and which thereafter should be manifested or proved, by any deed made by the party who is by law enabled to declare such uses or trusts, after levying or suffering such fines or recoveries, were and should be as good and effectual in the law as if the 29 Car. 2, c. 3, had not been made." As no peculiar form or solemnity is prescribed for the creation or declaration of trusts, and as the disposition of them is guided by courts of equity according to the presumed intention of the parties, it is not necessary that a declaration of a trust should be by deed, but a trust may be shown to exist by a letter, note, or memorandum in writing; 2 Vern. 106; 2 Bro. P. C. 39; 1 Saund. on Uses, 316; 2 Fonbl. on Equity, 35. Terms and expressions not altogether technical, and insufficient to limit an estate, will serve to direct a trust; Finch. Rep. 159. Intimations therefore, in a will, of hope or recommendation will raise a trust; 2 Madd. C. P. 6. And where a testator by his will devised his estate absolutely, and then directed that the devisee should pay his debts, a trust was held to be sufficiently created in favour of the creditors; 1 Vern. 411. Notwithstanding the 9th section of the statute 29 Car. 2, c. 3, requires all grants and assignments of any trust or confidence to be in writing signed by the party granting or assigning the same, that act is not now considered as extending to trusts of copyhold estate. Nor are trusts of personalty viewed as within the act. Such trusts therefore now, as well as before the Statute of Frauds, arise and may be declared by parol; 10 Mod. 404; 3 Bro. C. C. 557; 3 Rep. C. 38; S. C. 1 Keb. 490. If, however, trusts of personalty are attempted to be created where there is a written instrument, the principle of law will be sufficient to oppose the admission of parol evidence where it is at variance with the expressed or implied operation of such document. Trusts thus expressly created, when of real estate, devolve by the death of the trustee on his heir at law, or, in case an effectual will has been made, on the devisee; when of personalty, they vest in his executor or administrator; and in case of co-trustees, where there is a joint tenancy, they continue in the survivor, in the same manner, and with the same impression, as they originally sustained. In all cases, the party who has the legal interest in the estate is the proper person to declare the trust.

[ 207 ] Although the present note is chiefly applicable to the creation of express trusts, yet, as trustees by implication are subject to many of the same rules, it will be proper succinctly to consider the origin of such trusts. Implied, resulting, or constructive trusts, arise in all those cases where it would be contrary to the rules and principles of equity that he in whom the property becomes vested should hold it otherwise than as a trustee. The 8th section of the statute of Frauds, we have already remarked, exempts all trusts resulting by implication or construction of law from the operation of that act; and the words of this clause were holden, 1 P. Wms. 112, to relate to trusts and equitable interests only, and not to an use, which is a legal estate. Such trusts can only be in favour of those for whom they might have been declared by the party creating them. They arise from the manifest intention of the parties, or the nature of the transaction, where there is no written evidence of the trust; 1 Turner's Rep. 207. No person can be a trustee unless he accepts the trust and takes a vested interest in the subject of it. We will briefly examine the effect of this acceptance. The transmutation of possession of a freehold estate to a trustee is the same in its consequence as the transmutation of possession without a trust; it conveys to him the legal burthens, and invests him with the legal privileges. The trustee is actually seized of the freehold, and he is liable to all onerous services.

*Rights and duties of trustees.* A special privilege of the highest benefit annexed by the common law to the possession of the land, the right of voting for coroners, sheriffs, and members of parliament, could not be separated, retained, or superseded, by the creation of a trust, but the legislature was

obliged to interpose for that purpose, and accordingly the *cestui que trust* may vote for coroners or member of parliament when in possession, or until the trustee receives the rents and profits. In the case of copyholds the trustee, and not the person entitled to the benefit of the trust, is the person to be admitted, and the lord is entitled to a fine on the admittance of the trustee, or his heir or devisee, and as a heriot is due on the decease of the lord's tenant, it is payable on the death of the trustee, and not when the *cestui que trust* dies. The freehold thus vested in the trustee is not subject, in equity to the specialty or judgment debts of the trustee, nor can his wife claim dower or free bench out of it, neither can the husband of a female trustee be entitled as tenant by the courtesy. Where terms of years, or other chattels, real or personal, are the subject of a trust, the trustee has the complete legal ownership. The inherent right which every individual has of disposing of whatever interest may be vested in him exposes trust property to the alienation of the trustee, but the alienee takes only such estate as the trustee had therein, unless he were ignorant of the trust. The rights and interest of the trustee will also pass by his will under general words, and in case no such disposition be made by the testator, it vests according to its nature, on the decease of the trustee, in his real or personal representatives impressed with the trust. The trustee as the legal owner, is entitled to the possession of the property but he will not be permitted by a court of equity to keep the possession of real estate against his *cestui que trust*, Barnard Rep. 334, nor to disturb the possession of the latter when he has entered, if the *cestui que trust* be competent to sustain it, and the trust be not effected, 1 Ves. 194; although according to the general principles of law the *cestui que trust* can only be regarded as the tenant at will of the trustee; 2 Mer. 361. The legal estate of land vested in a trustee either in fee simple, or for a term of years, and all personal property held by a trustee, is forfeited by his treason or felony; the chattels and effects on conviction, and the lands on attainder, that is by judgment being given; and where a trustee dies without heirs, the lands escheat to the lord. But by recent statutes, 39 & 40 Geo. 3. c. 88; 47 Geo. 3 c. 24., the legislature has provided that where freehold or copyhold estates, which in the hands of any subjects would be chargeable with trusts, shall escheat to the crown, his majesty, notwithstanding the right to hold the same discharged of such trusts, may direct the execution of them.

Term of years and personal chattels do not appear to be within the provisions of these acts, and if the escheat of lands be not to the crown, it seems to be the prevailing opinion that the lord will hold them discharged of the trust. Where a trustee is a trader, and becomes bankrupt or insolvent, a party takes the benefit of the act, the property which he holds in trust, either expressly or by implication, is not within the provisions of the law concerning those persons. Nor will the trust estate or effects, if distinguishable from the general mass of the bankrupt's property, be effected by the assignment of the commissioners. If the trustee be an infant, or of unsound mind, or resident out of the jurisdiction of the Courts of Chancery and Exchequer, the same disabilities which attach to him as absolute owner of real or personal estate also subsist in regard to the trust property, except where it has been otherwise expressly provided by the legislature. By the stat. 7 Anne. c. 19. infants being trustees might be compelled, under the direction of the Court of Chancery or Exchequer, on petition of the parties beneficially interested, to convey and assure real estate vested in them on trust, which act, by the stat 4 Geo. 3. c. 19. was extended to the duchy of Lancaster, and the counties palatine of Chester and Durham, and gave the like authority to the courts of great sessions of the principality of Wales; the stat 1 & 2 Geo. 4. c. 114. enabled the lord chancellor, lord keeper, or commissioners of the great seal, where a trustee was idiot, lunatic, or *non compos mentis*, but had not been found by such inquisition, to appoint persons to convey and assure the trust estate on his behalf. The same provisions for the surrender and renewal of leases is made by the act of 29 Geo. 2. c. 31. in regard to lunatics as already mentioned respecting infants; and the stat 11 Geo. 3. c. 20. expressly empowers lunatics entitled to

renew leases, and their guardians and committees to accept the surrenders of old leases and grant new ones; and it is apprehended that these statutes will apply when the lunatic is merely a trustee; see 6 Geo. 4. c. 74.

*Remedies.* We will now introduce some remarks with reference to the remedies applicable to the law of trustee and *cestui que trusts*, and of the courts through whose interference effect is to be given to them. It was said by Lord Mansfield, 11 Eden, 223. "that the forum where they are adjudged is the only difference between trusts and legal estates. Trusts are considered in equity as between the person beneficially interested, as the ownership or legal estate except when it can be pleaded in bar of the exercise of this right of jurisdiction. Whatever would be the rule of law if it were a legal estate, is applied in equity to a trust estate. The trust (continues his lordship) is the legal estate in a court of equity, by imitation." "In the eye of the Court of Chancery, (Lord Hardwicke has said,) that an equity of redemption has always been considered as an estate in the land. It will descend, may be granted, devised, and entailed, and that equitable entail barred by common recovery." This proves that it is considered as such an estate whereof, in consideration of law, there may be a seisin, for without such seisin a devise could not be good of a trust. He who has the equity of redemption is considered as the owner of the land; 1 Atk. 603. It appears, then, that the *cestui que trust* has an estate in equity equivalent to the legal ownership. It will enable him to be sworn on an inquest, to vote for or serve as a coroner, or member of Parliament; it will qualify him to kill game, and generally to do any other act, in respect of the trust estates, which he could have done as legal owner. But he cannot sue in courts of law on his equitable title, but the action must be in the name of his trustees. The estate of the *cestui que trust* is, for the most part, regulated in equity in the same manner as is the legal estate at common-law. Thus a trust may be the subject of entail or limitation; it may be aliened; for although by the rules of law the *cestui que trust* can convey nothing more than the trust, and the legal estate in that case remains in the trustee, yet it is a general rule, that any legal conveyance or assurance made by a *cestui que trust* shall have the same effect as it would have had upon the estate in law, in case the trustees had executed their trust.

Having investigated the points as to who may be trustees, who may appoint them, and the legal and equitable interests of the trustee and the *cestui que trust*, the next subject of inquiry is how far a trustee is entitled to remuneration, and to what extent he is liable, and in what court his *cestui que trust* may secure redress. The office of a trustee is purely honorary. Therefore, whatever a trustee is considered as bound to do in the execution of his trust, he must do gratuitously, except where a provision has been expressly made for granting him a remuneration for his trouble. the same rule has been held to apply to one who is a trustee jointly with others. Lord Eldon 8 Ves. 72. refused to admit such a person to be a receiver, saying, "The testator, having named this person with others as trustees, meant to have the benefit of the exertion and management of all whom he named. This would be a mode of giving a trustee emolument." But it is generally understood they are entitled to be indemnified for all expences incurred by them, provided they have not been guilty of any breach of trust. The Court has refused to allow trustees to receive from the trust property sums which they have expended beneficially for infants in their maintenance and education, when such expenditure has amounted to more than the interest of the trust fund. It has, however allowed trustees to break in upon the capital of infants, property, for the purpose of apprenticing, or otherwise putting them out in life; 6 Ves. 473. Trustees who have conducted themselves fairly, and with such diligence as would [ 209 ] have been expected from a provident owner in the management of his own property, are also entitled to receive the amount of costs incurred by them in proceedings relative to the trust estate, either at law or in equity; 2 Atk. 48. 125; 1 Ves. Jun. 211. b.; 2 Id. 36. When costs are given to trustees, the courts do not confine them to taxed costs given to ordinary parties, but allow



what are technically called, costs as between solicitor and client; 2 Ca. Chanc. 138; 8 Ves. 8.

**General Duties of Trustees.** The courts of equity have considered it incumbent upon trustees to obtain and afford to their cestui que trust full information respecting the trust property, and to manage it with such diligence and care as might be expected from a provident owner in managing his own estate. A different conduct on their part is called a breach of trust. They have, therefore, been charged with interest and costs where they had not their accounts ready for inspection; they have been holden responsible for having dealt with trust property for their own advantage, and for having invested trust money on mere personal security, even though expressly empowered to lay it out on such good security as they could procure and should think prudent; 3 Swanst. 63; 1 Jac. & W. 148. What has just been stated are those rules of conduct to which trustees are usually bound to conform: but their ordinary powers may be either limited or enlarged by the expressions used in the instrument appointing them; for trustees ought not only to act consistently with those directions, but are strictly compellable to execute the trusts reposed in them according to their terms, when such conduct does not lead to the commission of any illegal act. Thus trustees being empowered to advance money to a particular person; with the approbation of another, were considered, 3 Mad. 98. guilty of a breach of trust, in advancing the money without a previous consent, although it had been subsequently obtained. Although it has been stated that courts of equity will compel a strict adherence, on the part of trustees, to those directions which the instrument creating the trust contains for managing the trust property, and will in the absence of any such directions require from them what they consider to be a provident management, yet no acts or defaults, however unfortunate in their consequences, will be punished as breaches of trust, provided they are not either at variance with the particular directions given, or inconsistent, according to the views taken by courts of equity, with a provident management. Trustees will not therefore be answerable for any loss which happens to trust property by mere accident; 3 P. Wms. 361. No action at law will lie against trustees for an abuse of their trust, either by the cestui que trust or his assignees. Trustees are in all cases precluded from making any personal advantage of their situation. This rule is most strictly enforced; 2 P. Wms. 597. Trustees have, in numerous instances, attempted to become purchasers of estates intrusted to their care, but they have rarely proved effectual. The existing law upon this subject is clearly settled. The general rule may be thus stated:—That in all cases where a trustee wishes to buy any part of the trust property, and not incur the risk of his purchase being afterwards set aside, he must either obtain a release from the trust, or apply to a court of equity for leave to become a purchaser, notwithstanding his office. In the latter case, if any suit in equity is pending respecting the trust property, the trustee should apply to the Court for an order to be allowed to become the purchaser; and if there is no such suit, then one should be instituted in which such order may be obtained. It has been said, 6 Ves. 627, that that is the only mode by which a trustee can be rendered secure of his purchase.

**Liability of Trustees.** Trustees have frequently been compelled to make good those losses which the trust estate would otherwise have had to sustain in consequence of the negligent, mistaken, or improper nature of their management; 2 Bro. C. C. 157. Wherever any of the cestui que trust, who were legally competent to consent, have not objected to the negligent or otherwise improper conduct of their trustee, after being fully informed of the nature of the transaction, they are not entitled, after such acquiescence, to call upon him to make good their losses occasioned by such conduct; but the same rule does not apply to a cestui que trust who has been misinformed, or to whom imperfect information has been given. The result of the cases as to the liability of trustees may be thus concisely stated. 1st. That trustees have been compelled to make good from their own property those losses which would

[ 210 ] otherwise have fallen upon their cestui que trust, or upon other innocent parties, through their negligent, mistaken, or improper conduct; and that such conduct only, on their part, has been considered as neither negligent, mistaken, nor improper, which was consistent with the particular directions contained in the instrument by which they were appointed; or, in the absence of any such directions, as the courts of equity would have deemed provident in an owner of the estate. 2ndly. Trustees have been held incompetent to deal with the property intrusted to them on their own account; and have therefore been compelled, notwithstanding a considerable lapse of time, to restore that in which they had attempted to acquire an interest, and to account for any profit which they had made by its use. Those cestuis que trust who had acquiesced in the breaches of trust of their trustees have been considered as having lost all claim against them, and have even been taken to be so far partakers in the misconduct, as to have rendered their own property liable for its consequences to the other cestuis que trust. Trustees are bound to lay out trust monies at interest, or they may be personally charged with it at four per cent. From the authorities with regard to trustees investing money, these conclusions seem deducible, 1st. That, when trustees have been guilty of neglect in permitting trust money to continue unproductive, or in not producing their accounts when properly required, they have been charged with interest upon the balances in their hands for the benefit of their cestuis que trust, at the rate of 4l. per cent. per annum. 2dly. That when trustees have been guilty of misconduct in employing the trust fund in any manner on their own account, or might, by a due compliance with the express terms of the trust, have made interest upon it at a higher rate than 4l. per cent., it has been at the option of the cestuis que trust whether they should be charged with interest at the rate of 5l. per cent. per annum, or account to them for the profits made by using the trust money; 11 Ves. 92; 13 Id. 407. 3dly. In two very particular cases, where trustees were expressly directed to accumulate interest upon the trust fund, and they had neglected to do so, they were not only charged with interest at the rate of 5l. per cent. per annum, but also had half yearly rests made in their accounts. Trustees are not chargeable for the acts or receipts of their co-trustees, except in those cases where they have expressly bound themselves to be so, or where their misconduct or inactivity has thrown such a responsibility upon them. Every executor may act independently of his co-executors; and when they have joined in signing receipts, each of them will be held answerable for the whole sum specified in the receipts; but as one trustee cannot give a discharge, which one of several executors may do, every person who pays money to the credit of a trust estate may require all the trustees to join in giving him a receipt; 2 Vern. 570. The signature of the whole body of trustees is necessary to show their conformity, although only those into whose hands the money actually came will be answerable for it. All trustees however, who have joined in signing a receipt are *prima facie* considered as having received the amount; and those who mean to exonerate themselves from that inference should show that the money acknowledged to have been received by all the trustees was in fact only by some or one of their co-trustees, and that they merely joined for the sake of conformity; 1 Vern. 303. The rule that trustees are not liable for losses occasioned by the misconduct of their cotrustees does not extend to cases where it has been through their own default or negligence, that their co-trustees have unnecessarily been invested with the power which has enabled them to occasion the loss. As a trustee is answerable for misapplication of the trust fund by his co-trustee, when it has been occasioned by the needless confidence which he has reposed in him, he will also be liable for misconduct of his co-trustee which has been connived at by him, although he has derived no advantage from it. If a person nominated a trustee with others refuses to accept the trust, it will be precisely the same as if he had not been so named, or was dead, and the whole estate will vest in the others. But any material degree of interference with the trust property, on the part of one who is appointed a trustee, is liable

## II. RELATIVE TO THE MODE OF CREATING THE RELATIVE SITUATION OF TRUSTEE AND CESTUI QUE TRUST.\*

1. *DOE, D. HULL, v. GREENHILL*, T. T. 1821. K. B. 4 B. & A. 684.

By the sect. 10, 29 Car. 2, c. 3, it is enacted, that it shall be lawful for every sheriff to whom any writ shall be directed at the suit of any person upon any judgment, statute, or recognizance, to deliver execution of all such lands, tenements, rectories, &c. as any other person be in any manner or wise seised or possessed in trust for him against whom execution is issued, like as the sheriff or other officer might or ought to have done if the said party against whom execution is issued had been seised of such lands, &c. of such estate as they

A trust created by a party for other persons is not a trust with in the 10th sect. 29 Car. 2, c. 29.

to be construed into an acceptance of the trust. There have been few decisions respecting the liability of trustees for those employed by them in managing the affairs of the trust, and they appear to have been principally confined to questions regarding the solvency of such agents. The rule seems to be, that trustees are at liberty to employ proper persons to act under them in managing the affairs of the trust; and they will not be considered responsible for any losses arising from the default of bankers or other agents, whom they have employed in the ordinary course of business, and without any apparent negligence, in the case of the trust property; 2 *Mad.* 275; 11 *Ves.* 381. In cases of a direct breach of trust no time will bar the right of cestuis que trust; nor does the statute of limitations, which affixes certain periods after debts and demands have accrued due, and the injuries occurred, within which the remedies given by courts of law must be sought, apply to the relief afforded in courts of equity. The Court will cause trustees, upon their application, to be released from their trusts; but not without previous inquiry whether they remain accountable for any acts done by them in that character. It may be proper to mention, that the responsibility to which trustees are subject is not considered to create such an interest in them as to preclude their being witnesses concerning the property, for the mismanagement of which they may have incurred person liability. The stat. 52 Geo. 3, c. 101, gives a summary mode of relief, by way of petition, against trustees of public charities. Independently of this statute, trustees for charities, whether they are individuals or corporate bodies, appear to have been considered as accountable for their conduct, precisely in the same manner as any other trustees; 13 *Ves.* 534; 18 *Id.* 319; 2 *Swanst.* 302; 3 *Mod.* 54.

\* What a trust is now is the same as a use was in former times; *Smith v. Wheeler*, 1 *Vent.* 130. If a term of years be assigned to A. for the use of B., this shall be a trust for B., and not a use executed; *Saunders v. Stevens*, *Com.* 271. A purchase by a father in the name of a son was held to be a trust for that son; *Redington v. Redington*, 3 *Ridgw.* 106. Where a man buys land in another's name, and pays the money, it will be a trust for him who pays the money, though there be no deed declaring the trust; *Anon.* 2 *Vent.* 361. B. conditioned for the payment of so much money to A., A. assigning over to the obligor such a judgment against B. if the money be paid, and no judgment assigned, A. becomes a trustee in judgment for the equity; *Turner v. Godwin*, 10 *Mod.* 223. A person is deemed a trustee if he takes an inheritance after notice of articles to settle the estate; *Skyrme v. Meyrick*, *Com.* 700. If a father purchase an estate in the name of a younger son, and the eldest disclaims a trust on his part, unless a creditor interpose, it is an advancement for the son in whose name it was made; *Redington v. Redington*, 3 *Ridgw.* 76. Where a father and son join in a purchase, it shall be intended for the advancement of the son, and that he is not a trustee; *Anon.* 3 *Salk.* 367, Pl. 1. A., as a guardian of B., an infant, made claims to certain lands before the justices of the Irish forfeitures, which being allowed, he entered on the lands. Part of these lands being out upon lease, A. procured a derivative lease thereof to himself, but it was decided to be in trust for the infant; *Annesley v. Dixon*, 7 *B. P. C.* 213.

[ 212 ] be seised of in trust for him at the time the execution is sued. To an action of ejectment, it was objected that, by a deed executed 23d June, 1809, long before the plaintiff's judgment was recovered, the legal estate in the premises was vested in trustees, for the purpose of securing an annuity to the defendant's mother. By the deed the trustees were empowered to enter, in case the annuity was in arrear, which they did in 1817. But at the time of the execution of the *elegit* and commencing the present action there was nothing in arrear. It was contended for the plaintiffs, that the case fell within the 29 Car. 2. c. 3, s. 10, as being premises held in trust for the defendant.

*Per Cur.* We are all of opinion, that this case does not present a trust within the intent and meaning of the statute. The words are "seised or possessed in trust for him against whom execution issued, like as the sheriff might and ought to do if that person were seised;" this statute made a change in the common law, and, up to a certain extent at least, made a trust the subject of inquiry and recognizance in a legal proceeding. We think the trust that is to be thus treated must be a clear and simple trust for the benefit of the debtor, the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in land being legally vested in another person, where it is so vested for the benefit of the debtor.

2. *EX PARTE GRACE.* H. T. 1799. C. P. 1 B. & P. 376.

If a person jointly in interest with an infant in a lease obtain a renewal to himself only, and the lease prove beneficial, he shall be held to have acted as trustee.

One H. being possessed of a beneficial lease under the trustees of a charity died, leaving his widow administratrix of his effects. By his death Mrs. H. became entitled to the lease jointly with E. T. H., her son by the deceased, and then an infant. Soon afterwards Mrs. H. married W. G., who, as her husband, having taken possession of the above-mentioned lease and title deeds, on the approaching expiration of the lease (and during the infancy of E. T. H.), treated with the trustees for a renewal of it to himself only, and in his own name, this accordingly was obtained. W. G. having afterwards become a bankrupt, his assignees took possession of the lease, and were proceeding to sell it for the benefit of the estate, when E. T. H. having attained the age of twenty-one, claimed his proportion of the money arising from the sale of the lease this matter having been referred to arbitration; an award was made in favour of E. T. H.

*Per Cur.* The point has been decided at least forty times. G. took the lease at his own peril; if it had not turned out beneficial, he must have sustained the loss, but as it is a beneficial lease, it must be for the benefit of the trust. This is the peculiar privilege of the unprotected situation of an infant. In the present case it has clearly proved a beneficial lease, or this application would not have been made to the Court.

### [ 213 ] III. RELATIVE TO RIGHTS OF TRUSTEE AND CESTUI QUE TRUST.

The doctrine that trustees shall not recover possession from or dispute it with his cestui que trust is now overruled, and the reverse so completely established that a trustee may now maintain an ejectment against his own cestui que trust.

1. *ROE, D. READ, v. READ.* H. T. 1799. K. B. 8 T. R. 118, 123; S. C. *GOODTITLE, D. JONES, v. JONES.* M. T. 1796. K. B. 7 Id. 43, 47. *DOE, D. DA COSTA, v. WHARTON.* M. T. 1798. K. B. 8 T. R. 2. *DOE, D. BLAKE, v. LUXTON.* E. T. 1795. K. B. 6 T. R. 289. overruling *LADR v. HALFORD.* H. T. 1794. 3 Burr. 1416; 1 Bl. Rep. 428. *DOE, D. HOBSON, v. STAPLE.* T. T. 1791. K. B. 2 T. R. 684. *DOE, D. GIBSON, v. POTT.* T. T. 1798. K. B. Doug. 710, 721. *DALES, D. HEYFALL, v. BRYDON.* M. T. 1791. K. B. 3 Burr. 1901.

*Per Lord Kenyon, C. J.* I agree with what was said in *Lade v. Halford*, 3 Burr. 1416, that, where the beneficial occupation of an estate by the possessor has given reason to suppose; that possibly there may have been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be advised to presume a conveyance of the legal estate; but if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party not clothed with that legal estate cannot recover in a court of law; and in this respect I cannot distinguish between the case of an ejectment brought by a trustee against his *cestui que trust*, and an ejectment brought by any other person.

2. **GOODTITLE v. JONES.** M. T. 1796. K. B. 7 T. R. 45. S. P. DOZ v. BOWERMAN. M. T. 1796. K. B. 7 Id. 2; S. C. 2 Esp. 499; S. C. DOZ, D. BROUDON, v. CALVERT. E. T. 1807. C. P. 5 Taunt. 170.

Per Lord Kenyon, C. J. On this special verdict the question between the two litigating parties was not open to discussion. It was stated in the verdict that an old term which was created in the last century had been from time to time assigned, and was noticed as a subsisting term so lately as in the year 1780, in the mortgage by Owen Jones to Derbyshire. That, as long as that was in existence, it was an answer to an ejectment brought by any other person. That, though under certain circumstances a judge might direct a jury to presume an outstanding satisfied term to have been surrendered by the trustee, yet if no such presumption were made, but it was stated as a fact, that the term still continued, such a legal estate in the trustee must prevail in a court of law. That what was said by Lord Mansfield, in *Lade v. Halford*, Bull. N. P. 110. that he would not suffer a plaintiff in ejectment to be non-suited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but direct a jury to presume it surrendered, must be understood with this restriction, that in either case the jury might presume the term surrendered; but that without such surrender the estate in the trustee must prevail at law, and that to the proposition so qualified he fully assented.

But under certain circumstances the jury may presume a satisfied term to have been surrendered to the cestui que use, but in the absence of such presumption the legal right of the trustee must prevail.

3. **SMITH, D. DENNISON, v. KING.** M. T. 1812. K. B. 16 East, 283.

It was admitted in argument, and the acquiescence sanctioned by the Court, that the possession of *cestui que trust* with the consent of the trustees can never be said to be adverse.

See *Earl Pomfret v. Lord Windsor*, 2 Ves. 472; *Keene v. Deardon*, 8 East, 248. 3d resolution.

4. **REX v. BATHURST.** E. T. 1759. K. B. 1 W. Bl. 210.

Motion for a mandamus to the churchwardens, &c. of St. Dunstan in the West to admit W. R. to Dr. W.'s lectureship in that parish. Dr. W., in 1622, by will devised an annuity for the support of a lecturer in St. Dunstan's, to prevent the increase of the doctrine of the church of Rome or other straggling opinions, who should preach every Sunday and Thursday, from the beginning of Michaelmas to the end of Trinity term, at a convenient hour in the afternoon (to be appointed by the churchwardens and officers of the parish), for the benefit of children and servants. About ten years ago Romaine

\* A. devises copyhold lands to trustees in fee (who are to be from time to time renewed in trust), that the rents and profits shall forever afterwards be disposed of to certain charitable purposes, and directs that the rent of the said copyhold lands, being 11*l.* per annum shall never be improved or raised, but shall continue at 11*l.* per annum, and that B., the tenant of the said copyhold lands, and his children and posterity, which shall succeed shall never be put forth or from the same, but always continue the possession, paying the rent of 11*l.* Neither B. nor his descendants were ever admitted on the Court rolls. If B. took an estate it was an equitable estate tail. The interest of B. (whatever it is) will not prevent the trustees recovering in ejectment, though the rent has been regularly paid. An equitable estate tail of a copyhold cannot be barred by the devise alone of the tenant in tail. *Quare*, whether it would be barred by a lease of the equitable tenant in tail for a long term, i. e. 2,000 years. But clearly, where such a lease is attended with doubtful or suspicious circumstances, it shall not prevent the trustees, who have the legal estate, from recovering in ejectment against the lessee. Nor is it an objection to the title of the trustees that, from the time of the original devise of A. to a certain period, the former trustees do not appear to have been admitted on the rolls of the manor, if there have been regular surrenders and admittances for a considerable length of time (ex. gr. for above forty years) since that period; for it will be presumed that surrenders and admittances were made duly before that period, especially as the rent has been paid during the whole time; *Roe, d. Eberall, v. Lowe*, 1 H. Bl. 447. An act of parliament, authorising trustees to improve public streets, and to sell waste lands, to defray the expenses of such improvements, and to use the money arising from such sales in such manner as they should think fit for the carrying the purposes of the act into execution, does not authorise them to expend such money in opposition of a bill in parliament; which, if passed would turn out disadvantageously to the purposes of the former act; *Edwards v. Wilson*, 2 Chit. 610.

† When the city lottery act, 46 Geo. 3. c. 97. vested certain premises in five trustees and provided that, in case of the death of one or more of them before the drawing of the

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The possession however of the cestui que trust is not deemed adverse to the title of the trustee.  
Trustees of a lecture to be preached at a convenient hour may appoint any hour they please, or vary their appointment.  
ment.†

- [ 215 ] was elected lecturer, and preached for many years at the usual hour of three, till Michaelmas term, 1789, when he was prevented by the vicar and churchwardens—the vicar preaching instead of him—which was the foundation of this motion. *Per Cur.* The trustees stand in Dr. W.'s place: they have determined, in conjunction with the rest of the parish, what is the proper hour, and shall the lecturer dispute it with him?

#### IV. RELATIVE TO THE LIABILITIES AT LAW OF TRUSTEE AND CESTUI QUE TRUST.

##### 1. DAVIES v. RIDGE, H. T. 1797. N. P. 3 Esp. 101.

Trustees by submitting matters to arbitration do not make themselves personally liable.\*  
Assumpsit upon an award, and for money had and received, against the defendants, as trustees of a Mr. P. The plaintiff had been a judgment creditor for 9,000*l.*, part of which had been paid, and it had been referred to arbitration, to ascertain how much was really due upon the judgment. The arbitrators had made an award in favour of the plaintiff.

Lord Eldon said the plaintiff must show the defendant had effects of the trust estates: submitting to arbitration did not make them personally liable. Mr. Ridge, one of the trustees, had admitted that he had money of the trust estate in his hands; and for the plaintiff it was submitted that this admission of one of them bound the rest. Lord Eldon. It would, if they were all personally liable, but not where they are only trustees.

*See ante, tit. Arbitration and Award, and Chit. Rep. 40.*

##### 2. BARTLETT v. HODGSON. M. T. 1785. K. B. 1 T. R. 42.

A clause in a deed "that [ 216 ] the trustees should not be chargeable with, or accountable for, any money arising in execution of the said trusts, but what the person or persons so to be as  
This was an action of debt on a bond in the penalty of 600*l.* given to the plaintiff by one Peter Holme, to whom the defendant was sister and heir-at-law, and also devisee of certain estates, &c. Plea, *plene administravit*, and *inter alia*, that she the defendant had a right to retain for a debt due to herself in the following manner: That by indenture made the 20th of June, 1759, between the defendant of the first part, one Thomas Hodgson of the second part, and the said Peter Holme and one J. Hardman of the third part, it was witnessed that, in consideration of a marriage then intended to be had and solemnized between the said Thomas Hodgson and the defendant, the defendant, E. Hodgson, did give, grant, bargain, assign, and set over unto the said Peter Holme and J. Hardman, their executors, administrators, and assigns, all and singular the personal estate of the said defendant, upon certain trusts mentioned in the said indenture; and it was thereby further declared and agreed, by and between the parties to the said indenture, that the said Peter and John, and their heirs, should not be chargeable with, or accountable for, the survivors should fill up the vacancy; held that a conveyance by four only was valid, one having died before the drawing took place; *Roe d. Reed v. Godwin*, 1 B. & R. 259. Payment by bankers to one of several trustees of the proceeds of stock, sold out under a joint power of attorney from the trustees, does not discharge the bankers as against the other trustees, unless previously authorised by them; *Stone v. Marsh*, 1 R. & M. 364. Abbott.

\* A party conveying to trustees an estate in land connected with an intricate establishment which, after the conveyance, he continues to manage without their interference, held to have authority from the trustees to bind them and the land by all acts in the ordinary management of the establishment; *Taylor v. Waters*, 7 Taunt. 374; *S. C.* 2 Marsh. 551. Where the trustees were authorised to give receipts for the purchase money of lands directed to be sold, and such money was to be laid out in the purchase of other lands, to be settled in the same manner as those sold, a purchaser, having paid the purchase money *bona fide* to the trustees, and having taken their receipt, cannot be affected by any misapplication of the money by them; *Raper v. Halifax*, 8 Taunt. 845. Where trustees, under the General Turnpike Act, 3 Geo. 4. c. 126. by improving the course of a public road, had caused a consequential injury to a private individual, whose estate abutted on the road, held that they were not liable to an action, it appearing that they had not exceeded the authority given them by that statute; *Bolton v. Crowther*, 4 D. & R. 195; *S. C.* 2 B. & C. 703; and see *Hall v. Smith*, 2 Bing. 155. Trustees appointed by the Liverpool Dock Act are liable to the duty on sales by auction ordered by them in the execution of their trust; *Rex v. Winstanley*, 8 Price, 180. A trustee who lodges money in a banker's hands merely on personal security, at the same time that he takes a bond for his own money, is guilty of gross negligence, and liable on failure of the banker; *Anon. Lofft.* 492.

ble for, and money arising in execution of the said trusts in the said indenture, but what the person or persons so to be accountable shall actually receive; that the marriage was solemnized; that Thomas Hodgson afterwards died; that J. Hardman died in the life-time of Peter Holme, who afterwards died also; that on the death of the said Peter Holme, administration of his estate and effects was granted to her, the defendant; that, in pursuance of the said indenture, the said P. Holme in his life-time received 1,800*l.* part of the said personal estate of the said defendant.

Per Lord Mansfield, C. J. This is merely a common clause of indemnity, which is inserted in all settlements. The sense of it is this, that the trustees and their heirs shall not be accountable for more than they receive: they are accountable for what they actually receive, but not as under a covenant.

**V. RELATIVE TO REMEDIES BY AND AGAINST TRUSTEES AND CESTUI QUE TRUST OF LAW.\*** See *ante*, tit. Parties to Action, and *ante*, p. 215. n.

**Erfer.** See *ante*, tit. *Leather*.

**Trinity College, Cambridge.** See *ante*, tit. *University*.

**Tunbridge Wells Bidders.** See *ante*, tit. *Parties to Actions*.

**Turbary.** See *ante*, tit. *Common*.

**Turning Highway.** See *ante*, tit. *Highway*.

**Turnpike.**

**1. LOANRY V. STONE.** T. T. 1825. K. B. 8 D. & R. 757; S. C. 2 B. & C. 515.

A turnpike act imposed a scale of tolls upon horses only, drawing or not drawing carriages respectively, as the case might be; and by a clause of exemption it was provided that no person should be liable to pay toll more than once for passing and re-passing the gates on the same trust at any time, at any one day with the same horses and carriages, through the same toll gate; but that every person having paid toll once should afterwards pass and repass with the same horses and carriages toll free during the same day, through the same gate where such toll was paid; and a stage coach drawn by four horses having passed through a gate on trust, and paid the toll in the morning, and free; held, in the evening of the same day, the same horses drawing a different coach of the same name, belonging to the same proprietors, driven by the same coachman, but carrying different passengers and parcels for hire, attempting to re-pass through the gates, and a second toll being demanded and refused, the collector seized one of the horses until it was paid. Held, in trespass for seizing and detaining the horse, that the action could not be sustained, the carriage and horses not being exempted from a second toll.

**2. NORRIS V. POTE.** M. T. 1822. C. P. 3 Bing. 41.

By the enacting clause of a turnpike act it was provided, that there should be taken of every person attending any cattle or carriage, for every horse drawing every stage coach, the sum of 6*d.* By an exempting clause it was added that, if any person should have paid the toll for passing, the same person upon producing a ticket, should be permitted to repass free with the

\* No action at law will lie against trustees, either by their *cestui que trust*, or in case of his bankruptcy, by the assignees of such *cestui que trust*; *Allen v. Imlett*, Holt, 641. And the Ecclesiastical Court has no jurisdiction over a trustee under a testator's will; therefore, where a trustee was arrested and committed on a writ *de contumace capiendo*, under the stat. 53 Geo. 3. c. 127. for not exhibiting an inventory and account of the goods of a testator, the Court of King's Bench ordered him to be discharged out of custody; *Rex v. Jenkins*, 8 D. & R. 41; S. C. Nom. ex parte Jenkins, 1 B. & C. 655. A trustee under the 54 Geo. 3. c. 137. (Scottish Bankrupt Act) cannot sue in his own name for a share in action; *Jeffrey v. M'Toggrat*, 6 M. & S. 126.

horses belonging to the same proprietor having paid once."

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same cattle or carriages. Held, that the toll having been paid by the coachman on passing for horses drawing a stage coach, a second toll could not be demanded for the same horses repassing, though with a different coach and different coachman, but belonging to the same proprietor.

3. *FEARNLEY v. MORLEY*. H. T. 1824. K. B. 7 D. & R. 832; S. C. 5 B. & C. 25. *S. P. JACKSON v. CARREEN*. H. T. 1824. K. B. 7 D. & R. 838; S. C. 5 B. & C. 31.

So where the toll was on the horses; held, that drawing a different coach did not subject them to a new duty.

And where a turnpike act imposed a toll on every carriage and on every horse passing, &c. and exempted the traveller from paying more than one toll; held, that the coach driven by the same man, though

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An exempting clause in a turnpike act is so to be construed favourably.

A turnpike act imposed tolls: 1st. Upon carriages drawn by horses; 2d. Upon horses not drawing; 3d. Upon oxen, &c.; provided that all persons having paid once for their carriages, horses, and cattle, returning the same day with the same carriages, horses, and cattle, should pass toll free. A subsequent act recited, that it was expedient to increase the existing tolls, and re-enacted the provisions of the former act, subject to some alterations; one of which was, that the former tolls should cease, and that instead thereof there should be paid a certain toll for every horse drawing a carriage. Four horses passed a toll gate in the morning, drawing a carriage, and repassed the same gate in the evening, drawing a different carriage: held, that being the same horses, they are not liable to a second toll.

4. *WILLIAMS v. SANGER*. E. T. 1810. K. B. 10 East, 66.

A turnpike act imposing a toll on every carriage and on every horse passing through the gate, and exempting any person from paying more than once in a day for passing or repassing with the same carriage, exempts the traveller from paying a second time in the day for the passage of the same carriage, though drawn by different horses, being the same in number; and another clause providing that, in all cases of carriages travelling for hire, the traveller or passenger therein shall be considered as the person paying the toll, and that such payment shall not exempt such carriages repassing with a different traveller, does not extend to stage coaches, the carriage itself not being there hired by the respective passengers, but only a conveyance by it; and, therefore, such stage coaches are freed of toll under the former clause, by one payment in the day, although returning with different passengers and different horses, the horses being the same in number.

drawn by different horses, and loaded with other passengers, was exempt.

5. *HICKINBOTHAM v. PERKINS*. H. T. 1824. C. P. 3 Moore, 185.

A clause in a turnpike act exempted from toll all carriages employed in the conveyance of materials for repairing the road, or any of the highways in the parishes in any part of the road; and in a subsequent part exempted generally carriages employed in conveying implements of husbandry or ma-

\* So, when a turnpike act imposed a toll first upon every carriage drawn by horses, then upon every horse not drawing, and then upon every drove of oxen or cattle, with a proviso that no more than one toll should be taken from any person repassing on the same day with the same horses, cattle, beasts and carriages; where a stage coach drawn by four horses paid the toll in the morning, and in the evening of the same day repassed with the same driver, but with different horses and passengers; held that a second toll was not payable; *Waterhouse v. Keen*, 6 D. & R. 257; S. C. 4 B. & C. 200. And where by a local turnpike act, 2 Geo. 2. c. 67. a certain toll was imposed on carriages, and not on the horses drawing them, with a provision that no person having paid such tolls, and producing a ticket, should be again liable on the same day; and by a subsequent local act, 49 Geo. 3. c. 28. reciting the former one, the old tolls were repealed, and others imposed, in respect of the horses drawing and not on the carriages; but all the provisions of the former act were to be continued as fully as if they had been re-enacted; held that toll having been made on horses passing with a carriage, no new toll was demandable on the same horses returning the same day, although drawing a different carriage; *Gray v. Shilling*, 4 Moore, 371; S. C. 2 B. & B. 30. A turnpike act imposed tolls first on horses drawing carriages; second on carriages fixed to waggons; third on horses not drawing; and fourth, on oxen, &c. providing that every person having paid the toll, on producing a ticket denoting such payment should be permitted to pass and repass once in the same day the gate mentioned in such ticket with the same horses or other beasts, coach, or other carriages, without being liable to any additional toll. Where the same horses passed and repassed once in the same day drawing different carriages belonging to the same person, held, that only one toll was payable; *Chambers v. Williams*, 7 D. & R. 842.

† The town of Battel, in the county of Sussex, is excluded out of the turnpike act of 26 Geo. 2. c. 54; *Hammond v. Brower*, 1 Burr. 376; S. C. 2 Ld. Ken 33. A cart drawn by



nure. In the following clause the trustees were empowered to compound with persons who resided in one parish and occupied lands in an adjoining parish. The plaintiff's waggon was passing on the road laden with lime, from one parish to another, for the purpose of the cultivation of his farm situate in the latter, neither of which were in any of those parishes through which the road passed; held that this, being an exemption in the former clause in favour of husbandry, was to be beneficially construed, and then it was not restrained by the subsequent one; and that consequently the plaintiff was not liable to the payment of toll.

6. HARRISSON v. BROUGH. T. T. 1796. K. B. 6 T. R. 706.

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The question was, whether, in a turnpike act imposing tolls on horses and cattle going to or returning from pasture, horses attending cattle returning from pasture are exempted. Lord Kenyon, C. J. The question is, whether a horse going to fetch cattle was attending the cattle at the time? Barely stating the question is answering it; when the horse is attending the cattle, the turnpike-man can see what is passing, and of course can judge when the party is entitled to the benefit of the exemption; but he has no means of knowing whether a horse is going to fetch cattle. If this were allowed to be an exemption, it would open a great door to fraud on the turnpike-men. I am, therefore, of opinion, that the plaintiff is neither within the words or the spirit of either of those exemptions. *Postea* to the defendant.

A provision exempting horses from toll "when attending cattle returning from pasture" only applies to horses actually in company with the cattle. A collector may sue for tolls though not appointed in the form prescribed by the statute imposing such tolls.

7. PEACOCK v. HARRIS. T. T. 1812. K. B. 10 East, 104.

In this case the Court held that a collector or renter of turnpike tolls, though illegally appointed, without the forms prescribed by the act of parliament, may still recover upon a count, for an account stated, the amount of the tolls for which he had credited the defendant passing through the gate, no objection being made to the plaintiff's title by the trustees or creditors of the

horses laden with manure for the manuring of land is exempt from toll; *Rex v. Adams*, 6 M. & S. 32. An act of parliament, exempting carts and waggons loaded with manure from toll exempts them from toll if they are going empty to fetch manure; *Harrison v. James*, 2 Chit. 507; 52 Geo. 3. c. 145. Under an exemption from toll, in an act of parliament for carts carrying compost, &c. or anything whatever used in the manuring of land, the carriage of lime is not exempt; the words "or any thing whatsoever used in the manuring of land" being considered as only applying to the carriage of ploughs, barrows, and such like instruments; *King v. Gough*, 2 Chit. 655. Lime is not within the exception of the turnpike act; 31 Geo. 2. Anon. Lofft. 324. A waggon returning from London loaded with dung is not liable to be weighed and charged with overweight, under 13 Geo. 3. c. 84. or 14 Geo. 3. c. 82. by carrying home two empty bottles and an empty basket, in which the produce of husbandry had been brought from the country the same day; *Chambers v. Eaves*, 2 Campb. 393. The question of exemption from toll cannot be tried in an indictment against the turnpike-keeper for extortion in taking the toll, unless the ground of exemption was specified to him at the time when the toll was taken; *Rex v. Hamlyn*, 4 Camp. 379.

A bridge is not a highway within the meaning of 13 Geo. 3. c. 84. s. 60. by which carriages employed in carrying materials for the repair of any turnpike-road or public highway are exempted from toll; and therefore toll is payable for a carriage employed in carrying materials for the repair of a bridge along a turnpike road; *Osmond v. Widdicombe*, 2 B. & A. 49.

Timber carriages laden with only one piece are not exempted out of the turnpike acts; *Stevens v. Doffy*, 2 Burr. 2258. Where a turnpike act exempted persons from toll in going and returning from their proper parochial church, chapel, or other place of religious worship, on Sundays, held, that the word "parochial" extended over the whole clause; and therefore a Dissenter was not within the exemption in going to and returning from his proper place of religious worship, situate out of the parish in which he resided; *Lewis v. Hammond*, 2 B. & A. 206. In a turnpike act imposing tolls on horses, &c. cattle going to or returning from pasture, and horses attending cattle returning from pasture, were exempted; held, that a horse ridden by the owner of the cattle at pasture did not come within either of the exceptions; *Harrison v. Brough*, 6 T. R. 706. The exemption in the General Turnpike Act, 13 Geo. 3. c. 34. from payment of toll by a passenger crossing a road, and not going 100 yards thereon, is confined to carriages, &c. merely crossing the road; *Phillips v. Harper*, 2 Chit. 412. The General Turnpike Act, 13 Geo. 3. c. 84. s. 34. exempts from toll carriages passing on a turnpike road for a less distance than 100 yards, whether they quit the road on the same side on which they entered it, or the opposite side; *Mayor v. Oxenham*, 5 Taunt. 340.

\* Toll-gate keepers suing for acts done under the 25 Geo. 3. c. 51. need not sue in the county where the fact was committed, as they must do under the 13 Geo. 3. c. 78. s. 81;

turnpike. And the plaintiff having sent to the defendant an account of the tolls due, who not long after sent 5*l.* inclosed in a letter to the plaintiff, in which he stated that she should have the remainder next week, is evidence of such an account stated, and a recognition of the intestate's title to be accounted with for the tolls; *Peacock v. Harris*, 10 East, 104.

### University.

The construction put by the University on their statute is final.\*

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The Vice Chancellor of Cambridge may claim consequence of the plea where it concerns any member of the University before imparlance.†

1. *REX v. THE CHANCELLOR OF CAMBRIDGE*. M. T. 1794. K. B. 6. T. R. 89.

Per Lord Kenyon, C. J. The interpretation put by the Universities on their own statutes is conclusive.

2. *CASE OF THE UNIVERSITY OF CAMBRIDGE*. H. T. 1712. K. B. 10 Mod. 126.

The University of Cambridge had a charter granted to them by Queen Elizabeth, whereby *cognitio placitorum*, with exclusive words *non alibi*, &c., was given to the Court of the Vice Chancellor, to proceed *secundem legem et consuetudinem* of the University in all cases where any of the body are defendants, which charter was confirmed by parliament.—Resolved, that after imparlance it was too late to make that claim.

### Unlawful Assembly.†

*Baring v. Skelton*, 5 T. R. 16. A notice of action under an act of parliament against a toll-gate keeper for demanding and taking of the plaintiff toll for and in respect of certain matters and things particularly mentioned and exempted from the payment of toll, in and by a certain act of parliament, intituled, &c. is uncertain and bad; *Freeman v. Fine*, 2 Chit. 673.

\* The university have no right to a copy of publications entered at Stationers' Hall; *Cambridge, University of, v. Peyer*, 16 East, 317.

† The charter of the University of Cambridge does not extend to sue there for the penalty of an act of parliament; but such suits ought to be in the King's Court, for a recovery there is not pleadable in bar here; *University of Cambridge v. Price*, Skin. 665. When an attorney is plaintiff, the University is not entitled to consuance of the cause; *Somb. Willes*, 233. 240, 241. The University of Cambridge moved for a supersedeas to a prohibition, or for a consultation, but ruled that they ought to declare and plead their privilege; and when it was pleaded, they would take notice of it upon a motion; and rule was given for them to declare; Skin. 665.

‡ An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons basely assembling together with an intention to do a thing; which, if it were executed would make them rioters, but neither actually executing it nor making a motion towards its execution. Mr. Serjeant Hawkins, however, thinks this much too narrow an opinion, and that any meeting of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly. As, where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such assembly; 1 Hawk. P. C. c. 65. s. 9. So, in recent cases, it has been ruled that an assembly of great numbers of persons, which, from its general appearance and accompanying circumstances, is calculated to excite terror, alarm, and consternation, is generally criminal and unlawful; *Rex v. Hunt and Others*, York Spring Assizes, 1820; *Bedford v. Binley*, Lancaster Spring Assizes, 1822; 3 Stark. c. 76. And all persons who join in the assembly of this kind, disregarding its probable effect, and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. An assembly of a man's friends for the defence of his person against those who threaten to beat him if he go to such a market, is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the person by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle; 1 Hawk. P. C. c. 65. ss. 9, 10; 19 Vin. Abr. Riots, &c. 5, 6; *Regina v. Soley*; 11 Mod. 116. He is not, however to arm himself, and assemble his friends in defence of his close; *Rex v. the Bishop of Bangor*, Shrewsbury Summer Assizes, 1796. The conspiring of several persons to meet together for the purpose of disturbing the peace and tranquillity of the realm, and of exciting discontent and disaffection, and of exciting the king's subjects to hatred of the government and constitution, may be prosecuted by an indictment for a

**Use and Occupation.\*** See *ante*, tit. *Covenant; Double Rent; Land-lord and Tenant; Rent.* [ 222 ]

## I. RELATIVE TO DEBT FOR.

(A) DECLARATION, p. 222.

(B) PLEAS, p. 224.

## II. RELATIVE TO ASSUMPSIT FOR.

(A) IN WHAT CASES, AND BY AND AGAINST WHOM SUSTAINABLE, p. 225.

(B) PLEADINGS, p. 228.

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## I. RELATIVE TO DEBT FOR.

(A) DECLARATION.

1. *ELGER v. MARSDEN*. H. T. 1807. C. P. 5 Taunt. 25.

The plaintiff declared that the defendant was indebted to him at London St. Mary-le-bow, for the use and occupation of a certain messuage of the plaintiff's by the defendant at his request, and with the plaintiff's permission, occupied without showing where the house was. After a verdict for the plaintiff, a rule nisi was obtained to set it aside upon the ground that in the declaration no county was shown where the premises were situate, which was necessary, this being a local action. Mansfield, C. J. The Court of K. B. have clearly decided, in *King v. Fraser*, that debt for use and occupation is not a local action, for if it were a local action, the demurrer in that case must clearly have been allowed. They have decided therefore, only that it is unnecessary to name the parish, but it is unnecessary to show in what county the premises lie. However, even upon the old doctrine, the plaintiff may bring his action where he will: in respect of the privity of contract, there is no distinction in this point between a parol lease and a lease by deed.

2. *WILKINS v. WINGATE*. M. T. 1796. K. B. 6 T. R. 62.

This was an action of debt. Issue was taken on the plea to the first count; it was alleged in the second count, that the plaintiff, on the 20th December, 1791, demised to the defendant a messuage, &c. for three years, to commence on the 21st of that month, at the yearly rent of 30*l.*, payable on the 25th of March, the 24th of June, the 29th of September, and the 25th of December; that the defendant entered on the 22nd of December, 1791; and that 15*l.*, for half a year's rent became due on that day. The third count was for use and occupation generally, for 10*l.* for half a year. To the second count the defendant pleaded, that plaintiff had nothing in the said messuage, with the appurtenances, at the time of making the demise therein supposed, or at any time since, whereof he could make the said demise. He demurred to the last count. The plaintiff replied to the second plea, that the defendant ought not to be admitted to say that he the plaintiff had nothing in the said messuage, &c., because the plaintiff demised the said messuage, &c. to the defendant, by a deed dated 20th of December, 1791, which was sealed by the defendant conspiracy; *Rex v. Hunt & Other*, 3 B. & A. 566. Unlawful assemblies and seditious meetings having in many instances appeared to threaten the public tranquillity and the security of the government, several statutes have been passed for the purpose of their more immediate and effectual suppression. The statutes, however, being numerous, it will suffice to refer to them; 1 Geo. 1. s. 2. c. 5; 39 Geo. 3. c. 79; 60 Geo. 3; and 1 Geo. 4. c. 1; 33 Geo. 3. c. 29; 13 Car. 2. s. 1. c. 5; 57 Geo. 3. c. 19; and a more recent statute, 60. Geo. 3; and 1 Geo. 4. c. 6. contained many enactments relating to assemblies of persons collected for the purpose or under the pretext of deliberating on public grievances and of agreeing on petitions and addresses to the throne, or to the houses of parliament, which were only temporary enactments, and appear to have now expired. But the stat. 57 Geo. 3. c. 19. contains also several enactments relating to meetings and assemblies of persons which are not of a limited duration. As to the indictment, evidence, trial, and punishment, see *ante*, tit. Riot.

\* An action of debt or assumpsit will lie for use and occupation where rent is in arrear by a tenant who holds under a lease, not by deed, as under a writing without seal, or a parol demise. The cases as to when action may be sustained are collected post, div. 11.

as well as the plaintiff. To this replication the defendant demurred, and assigned for cause, that the demise in the replication was not averred to be the same demise as was mentioned in the second count; and that it did not appear in or by the replication for what term the plaintiff demised the said messuage, &c. to the defendant, or that it was for the said term, or under the same rent, as set forth in the second count of the declaration. Counsel for the defendant was proceeding to argue that an action of debt would not lie for use and occupation generally, for that the particulars of the demise, the entry of the lessee, and the time when the rent became due, should have been stated.

Lord Kenyon, C. J., said, that the contrary had lately been determined in the Court of Common Pleas, and that, according to a case in Salk. 277. the second plea could not be supported, both parties having executed the deed; though, whether the estoppel was formerly replied, was perhaps another question.

3. *REX v FRASER*. H. T. 1809. K. B. 6 East, 348; S. C. 2 Smith, 462.

And with  
out stating  
where the  
premises  
are situated.

In debt for use and occupation the plaintiff declared generally for the use and occupation of divers messuages, lands, and tenements, without specifying where they are situated. Lord Ellenborough, C. J. The moment it is laid down that an action of debt will lie for use and occupation, the action of debt attracts to itself all the generality of pleading which is allowable in the ordinary count for use and occupation in *assumpsit*. The question in this case will be, therefore, whether a count in *assumpsit* so framed as this is, and omitting to state the place where the messuage is situated, would be bad? Now it appears to me, that, if it were held to be necessary so to state it, it would introduce a degree of nicety and exactness which might be the means of turning round a plaintiff and causing him to be nonsuited on a point of no importance. A general action is given by the statute for use and occupation, and in the general form of declaring for goods sold and delivered, or for bodily labour done and performed, even there the one must be delivered and the other done in a particular place, but yet that place and many other unimportant circumstances are omitted. If the plaintiff should yet charge the defendant with another action, he may now say he has been sued before, averring such circumstances for modifying the cause of action as may be necessary, including an averment of the local identity of the premises. This is as much particularity as is necessary in either of the cases which I have mentioned, and in this a greater strictness is not necessary.

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4. *KIRKLAND v. POUNSETT*. T. T. 1803. C. P. 1 Taunt. 570. *ELGER v. MARSDEN*. H. T. 1807. C. P. 5 Taunt. 25.

And it is  
now the set-  
tled prac-  
tice to omit  
such local  
description.\*

Infancy  
seems no  
defence to  
this action†

In an action for use and occupation, the Court said: The local situation of the premises need not be alleged in the declaration.

#### (B) PLEAS.

1. *HANDS v. SLANEY*. E. T. 1800. K. B. 8 T. R. 578.

Per Lord Kenyon, C. J. Use and occupation falls within the fair liability which the law imposes on infants for being bound for necessaries.

\* But if stated, and described as situate in a wrong parish, it is a fatal variance, *Wilson v. Clark*, 1 Esp. 233; *Guest v. Carmont*, 3 Campb. 235; but where they are described as situated in the parish of Lambeth, the real name of the parish being St. Mary, Lambeth, though usually called Lambeth, the variance was held immaterial, *Kirkland v. Pounsett*, 1 Taunt. 570; *Goodtitle v. Walter*, 4 Taunt. 632. where it is said to be sufficient to describe premises as lying in any parish by the name by which the parish is ordinarily known; but see *Taylor v. Sleaman*, 1 B. Moore, 161.

† In debt for rent, on a contract in writing, deed, or parol, the ordinary and proper plea is *non demisit*. The Statute of Limitations is a good plea, which enacts that all actions for rent arrear, founded on any contract without specialty, must be brought within six years. The statute of Limitations is a good defence in an action against a person who has been tenant-from year to year, but who has not within the last six years occupied the premises, paid rent, or done any act from which a tenancy can be inferred, though no notice to quit has been given; *Leigh v. Thornton*, 1 B. & A. 625. Entry and eviction is a good plea to this action, so that it be such a tortious entry and expulsion as to prevent any enjoyment or beneficial occupation of the premises; or a tender and refusal or set-off may be pleaded.

## 2. CRISP V. CHURCHILL. Cited 1 B. &amp; P. 340.

Per Buller, J. To an action for use and occupation, showing that the premises were occupied for a criminal purpose with the plaintiff's knowledge is an answer to the action.

But that the premises have been occupied for a crim

## II. RELATIVE TO ASSUMPSIT FOR.\*

## (A) IN WHAT CASES, AND BY AND AGAINST WHOM SUSTAINABLE.

## 1. BULL V. SIBBS. M. T. 1799, K. B. 8 T. R. 327.

A. agreed to let lands to B., who permitted C. to occupy them. A. brought an action against B. for use and occupation.

[ 225 ]  
inal pur  
pose with  
plaintiff's  
knowledge  
is a good  
defence.

The Court said that, if C. occupied the land under the defendant, the latter was answerable to the plaintiff in this form of action; that an action by the tenant of the defendant was, as far as respected the plaintiff, an occupation by the defendant himself; that it need not be stated in the declaration that C. held and occupied at the instance and request of the defendant, it being sufficient to declare on the legal operation of an agreement that, where goods sold are, by order of the vendee, delivered to a third person, an action may be maintained on the common count as for goods sold and delivered to the vendee himself, though in practice it is generally stated that the goods were delivered to such third party at the request of the vendee.

This action is maintainable though the defendant did not occupy the premises, but let them to another.

## 2. NAISH V. TATLOCK. T. T. 1793. C. P. 2 H. Bl. 319.

In an action against the assignees of B., a bankrupt, the declaration stated, that the defendants on such a day were indebted to the plaintiff in L. for the use and occupation of two houses, &c. before that time occupied as well by the bankrupt, whose estate therein the defendants afterwards had, as by the defendants, at their special instance and request, for one year then elapsed, and as tenants thereof respectively to the plaintiff, and by his permission the

[ 226 ]  
But to charge one person for the use and occupation of another, it must ap

\* The stat. 11 Geo. 2. c. 19. s. 14. was introduced by the legislature in order to obviate the frequent difficulties which occurred in the recovery of rent where the demise was not by specialty, which provides that it shall and may be lawful for the landlord in such a case, to recover a reasonable satisfaction for the lands, &c. occupied by the defendant, in an action on the case, for the use and occupation of what was so held and enjoyed; and if it shall appear that there was a parol demise, or an agreement (not by deed) whereon a certain rent was reserved, the plaintiff shall not, therefore, be nonsuited, but shall make use thereof as evidence of the quantum of damages to be recovered. And by the same act, if a tenant for life die before or on the day on which any rent was made payable upon any lease, which determined on the death of such tenant for life, his executors may in an action on the case, recover the whole or a proportion of such rent, according to the time when such tenant for life lived of the last year, or quarter of a year, in which the said rent was growing due. This action being founded on a contract, express or implied, it will not lie where the holding of the tenant is adverse and tortious, unless the plaintiff discontinues to consider it as such, by waiving the tort, and recurring to his remedy by this action on the contract; hence an action of ejectment, and for use and occupation, if resorted to at the same time, would be incongruous and totally unsustainable; for in the one, the plaintiff acknowledges the defendant as his tenant, and requests payment of rent; in the other he says he is no longer his tenant and therefore must deliver up the possession, which would be absurd and inconsistent. So, the husband was holden not liable in an action for use and occupation by his wife, partly before and partly after marriage. The action may also be maintained without attornment or acknowledgment of title upon the stat. 4 & 5 Ann. c. 16. s. 9. & 10. by the trustees of one whose title the tenant had notice of before he paid over his rent to his original landlord, although the tenant had no notice of the legal estate being in the plaintiff on the record. And the grantee of an annuity charged on the land, or a mortgagee, after notice to the tenant, may also recover rent from the tenant, in an action for use and occupation. This action may be supported against a yearly tenant, upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and the occupation of the premises by the assignees during part of the time for which the rent accrued due; but such an action is not sustainable if it appear that the premises were let to the defendant, with the knowledge of the plaintiff, for an illegal purpose, as to a prostitute, the contract being *contra bonos mores*; 1 B. & P. 340. n. 1. It will be proper to remark that the statute provides a remedy in such cases only where the agreement is by deed, but it has been holden in one case, 4 Esp. 59. where the defendant held under a mere agreement for a lease, which did not amount to an actual demise, that the plaintiff might maintain an action for use and occupation, although such agreement was not by deed.

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ters express  
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sion.\*

second was upon a *quantum meruit* to the same effect as the *indebitatus*. The facts of the case were, that after B. had occupied the premises during part of the year under an agreement to pay rent a year for them, he became a bankrupt, whereupon the defendants, his assignees, entered into possession, and continued in the possession for the remainder of the year. A proportion of the annual rent for that part of the year during which the defendants were in possession was paid into Court. It was holden that, if the plaintiff could recover at all in this form of action against one person for the use and occupation of another (as to which the Court would not give any opinion), it must be on the ground of the occupation having been permitted at the defendant's request; and that request must be proved that the words at the special instance and request of the defendants were in this case words of substance, and operative connected with the occupation of the defendants, for which they were bound to make a satisfaction with the occupation of B., a stranger, for whose occupation, *prima facie* at least, the defendants were not liable; that, in point of fact, it was not at the request of the defendants that B. had been permitted to occupy; the defendants had no relation to B., but as his assignees, and that relation did not commence until the close of B.'s occupation; that relation, therefore, alone could not have the effect of making them personally liable to answer for his occupation before his bankruptcy. The averment that he had been permitted to occupy at the request of the defendants was therefore substance, and not mere form, and as the plaintiff had failed in the proof of it, he was not entitled to recover from the defendants the rent due for B.'s occupation.

### 3. REDPATH v. ROBERTS. 1796. N. P. 3 Esp. 285.

Where no  
notice to  
quit has  
been given,  
the lessor,  
by putting  
up a bill,  
does not de  
termine the  
tenancy.†

In an action for use and occupation of apartments in the plaintiff's house during half a year, it appeared that the rent was claimed in consequence of the defendant having neglected to give a notice to quit; the defence set up was, that the plaintiff, after the defendant had quitted, had put up a bill at the window, but Lord Kenyon, C. J., expressed an opinion, that the defence insisted on would afford no answer to the plaintiff's action, it was for the benefit of the defendant that the apartments should be let; nor would he infer from the circumstances of the parties endeavouring to let them that the contract was put an end to; that there must be other circumstances to show it, and not merely an act of so equivocal a kind; that, as the plaintiff had proved the taking the premises and the payment of the rent, it was incumbent on the defendant to prove that the tenancy was determined by express evidence. The defendant thereupon proved that a notice to quit had been given, in which the plaintiff had acquiesced, and obtained a verdict.

### 4. COBE v. CARPENTER. M. T. 1810. 2 Campb. 13. n.

Where the  
defendant  
has not ob  
tained pos  
session un  
der the  
plaintiff,  
the plaintiff  
can only re  
cover rent  
from the  
time he has  
had the le  
gal estate  
in him, al  
though he  
may have  
had the e

The defendant entered upon a leasehold cottage under T. S., who soon after mortgaged it to W. S., and in 1806 assigned the equity of redemption to the plaintiff. On the 18th of July, 1808, W. S. assigned the legal estate in premises to the plaintiff; the defendant continued in possession till the Michaelmas following, and had paid no rent for the last two years. It was contended that, although a person having the equitable estate only perhaps could not maintain use and occupation without privity of contract; yet, the plaintiff being now clothed with the legal estate, his title would have reference to the time when the equity of redemption was assigned to him, so as to entitle him to two years' rent. But Lord Ellenborough clearly held that he could only

\* Where a sale is rescinded from the vendor's neglect to make a good title, he cannot sue the vendee, who had been let into the possession for the use and occupation antecedent to the rescission; at least he cannot if he had the use of the purchase money in the interim or such a proportion as whence he might have gained an equivalent to the benefit resulting from the occupation; *Kutland v. Pounsett*, 2 Taunt. 145.

† So, the delivery of the keys of the house by an agent of the tenant to a female servant at the house of the landlord was held by Lord Ellenborough, C. J., not sufficient to prove a determination of the tenancy, the female servant not having been called, and it not appearing that the keys ever reached the plaintiff, and been accepted by him.

recover the rent for the period between the 18th of July and Michaelmas-day, 1808. quitable estate long before.\*

5. *Root v. Wilson*. E. T. 1809. K. B. 8 East, 311.

In consideration that the defendants, on the 26th of November, 1801, had become and were tenants of a messuage under a yearly rent of —l.; the defendants promised to pay the same during the continuance of the tenancy, with an averment, that the defendants continued tenants from the time of making the promise hitherto; that the defendants did not, during the continuance of the tenancy, pay the rent; that on the 29th of September, 1803, half a year's rent was in arrear. *Indebitatus assumpsit* for use and occupation. *Quantum meruit*. Plea, that the defendants were traders, and committed an act of bankruptcy on the 2nd of April, 1803; that a commission issued on the 5th of May following; that an assignment was executed on the 21st of May of the interest of the defendants in the messuage, and A. and B. who became and were on the last mentioned day, and thence until the rent became due, continued to be possessed of, and occupied the messuage. On demurrer, it was holden that, as it had been determined in *Annot v. Mills*, that a bankrupt lessee, though out of possession, was still liable upon his covenant to pay, so here the defendants were liable upon their agreement to pay the rent; that there was not any distinction in this respect between an agreement and a covenant, which is an agreement under seal, except as to the form of the remedy upon it; that the case of *Annot v. Mills*, to which this was perfectly analogous, did not turn on any particular effect of a covenant under seal, but on its being the personal agreements of the parties; and although it was objected, that if the action was holden to lie, the consequence would be, that there must be an apportionment of the rent, yet the Court observed, that the landlord had nothing to do in this case with the question of the apportionment of the rent; for he proceeds against the parties with whom he made the agreement which has been broken; the Court, therefore, said nothing of his right to recover against the assignees. Before 6 Gen. 4.1 as assumpsit for use and occupation lay against a lessee upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy and occupancy by the assignees. [ 228 ]

(B) PLEADINGS.†

(C) EVIDENCE.§

1. *PRESTON v. MERCEAU*. H. T. 1778. C. P. 2 Bla. 1250; 3 Wils. 276.

Action on the case for the use and occupation of a house, of which, on the 21st of July, 1775, it was agreed in writing, that a lease should be let by Christina Preston to Abraham Gamage for twenty-one years, at 26l. per annum, Where there was a note in writing expressing the terms of holding, it must be produced.

\* An action of debt or assumpsit will lie for use and occupation, where rent is in arrear by a tenant who holds under a lease, not by deed, as under a writing without deed or parol demise.

† But now by that stat. s. 75. any bankrupt entitled to any lease or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants or agreements therein contained; and, if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid. Where assignees entered and occupied premises in the middle of a year, it was held that use and occupation could not be maintained against them for the bankrupt's occupation as well as their own, without proving that the plaintiff's occupation was at their request; *Navis v. Satlock*, 2 H. Bl. 319; *Gibson v. Coarhorpe*, 1 D. & R. 205. A husband is not alone liable for the occupation of a house by his wife *dum sola*; *Richardson v. Hall*, 1 B. and A. 50.

‡ The observations on the pleadings in debt for use and occupation are equally applicable to this action, except that the general issue is non-assumpsit, which is a legal denial subsistence of the debt, or cause of action at the time of commencement of the suit.

§ To enable the plaintiff to support an action for use and occupation, he must either prove an actual demise, or permission to enter or hold under an agreement for a future lease, or show the antecedent payment of rent to him by giving notice to the defendant to produce the receipts. Evidence must also be adduced to prove that the defendant has occupied the premises, and that such occupation has been, as far as depended on the plaintiff, beneficial to the defendant. It is *prima facie* sufficient for the plaintiff to prove that the defendant occupied the premises, and the continuance of the occupation will be presumed until the contrary appear; *Harland v. Bromley*, 1 Stark. 456; *Ward v. Mason*, 9 Price, 291. It

[ 229 ] to commence from Michaelmas then next. Gamage died, and made Merceau his executor, who paid 26*l.* into court for one year's rent. On the trial, the plaintiff offered to show by parole evidence that, besides the 26*l.* per annum, the defendant had agreed to pay 2*l.* 12*s.* 6*d.* a year, being the ground rent of the premises, to the ground landlord; but no evidence was offered of the actual payment of such ground rent during the testator's life, without which De Grey, Chief Justice, thought such parole evidence inadmissible, and nonsuited the plaintiff. But Blackstone, J. (absente Gould, J.,) I am clearly of opinion, that the Lord Chief Justice did right in rejecting this evidence. Courts should be very cautious in admitting any evidence to supply or explain written agreements, else the Statute of Frauds would be eluded, and the same uncertainty introduced by suppletory or explanatory evidence, which that statute has suppressed in respect to the principal object. It never ought to be suffered so as to contradict or explain away an explicit agreement; for that is in effect to vary it. Here is a positive agreement that the tenant shall pay 26*l.* Shall we admit a proof that this means 28*l.* 12*s.* 6*d.*? What is it to the tenant to whom the rent is to be paid, so as he is obliged to pay more than his contract expresses? We can neither alter the rent nor the term; the two things expressed in this agreement. With respect to collateral matters it might be otherwise.

2. *DOE, D. ST. JOHN, v. HARE.* 1799. N. P. 2 Esp. 724.

Stamped; To prove the taking and occupation, one G. was called as a witness. He was asked by the defendant's counsel if the agreement between him and H. had not been in writing. He answered that it was. Notice had been given to the defendant to produce it; and it was now produced, but it was unstamped; and the defendant's counsel objected that it could not therefore be given in evidence. Lord Kenyon, C. J. The instrument is produced in evidence of an agreement which the law requires to be stamped, and I am bound by that law not to admit it without it. The *King v. Middlesey* decided that, where an instrument was produced by the opposite party, it dispensed with the necessity of calling the subscribing witness; which, from the circumstance of the instrument being in the hands of their adversary, the party could not know who he was; but that case went no farther.

*See 6 T. R. 452; 7 Id. 241; 2 B. & P. 118; 1 N. R. 272.*

3. *BREWER v. PALMER.* T. T. 1800. 3 Esp. 213.

And parole evidence cannot be received where a written contract exists.\*  
[ 230 ] *Assumpsit for use and occupation.* On examination of a witness, who proved the occupation by defendant, it appeared, that there had been an agreement in writing, but not stamped. It was contended by plaintiff's counsel, that the agreement not having been stamped was not binding on the parties, and that, therefore, the plaintiff might waive this, and go into evidence generally for use and occupation. It was insisted for the defendant, that it appeared that defendant held under a written contract, and, therefore, the defendant was bound to give it in evidence.

Eldon, C. J., was of this opinion, observing, that this being a specific contract between plaintiff and defendant, the plaintiff is bound to show what the contract was; it may contain clauses which may prevent plaintiff from recovering; others, for the benefit of defendant, which he had a right to have produced; but the contract not being stamped, it could not be given in evidence; therefore, the plaintiff must be nonsuited.

*See 12 East, 237; 8 Taunt. 327; 1 Bing. 147; 6 T. R. 452.*

is not necessary for the plaintiff to prove a personal occupation of the premises by the defendant, an occupation which the defendant might have had if he had not voluntarily abstained from it, is sufficient, per Gibbs, C. J. *Whitehead v. Clifford*, 5 Taunt. 519; and if a agree to let lands to B., who permits C. to occupy them, B. may be sued for use and occupation; *Bull v. Sibbs*, 8 T. R. 327; *Dingly v. Angrove*, 2 Smith, 18; *Cenolly v. Baxter*, 2 Stark. 527.

\* But with respect to mere collateral conditions, a party will be entitled to show, by parole proof, who is to perform these acts concerning which nothing is mentioned in the written document.



4. COOKE v. LOXLEY. M. T. 1792. K. B. 5 T. R. 4.

In an action for use and occupation of glebe lands, it appeared that the former incumbent had let the lands in question to the defendant, who had continued tenant to the present incumbent, the plaintiff, and had paid him half a year's rent for the same. This action being brought for some arrears of rent, the defendant offered to give evidence of the plaintiff's being simoniacally mission of presented, of which, as it was stated, the defendant was ignorant when he paid the former rent. But, Lord Kenyon, C. J., refused to receive this evidence, being of opinion that the case fell within the common rule, that a tenant should not be permitted to impeach the title of his landlord in an action for use and occupation. There was a verdict accordingly for the plaintiff. The Court of King's Bench, on motion for a new trial, concurred in opinion with the Chief Justice.

(D) DAMAGES.†

**Uses.\***

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I. RELATIVE TO USES PRIOR TO THE STAT. 27 HEN. 8. c. 10. §

\* And it is not material in such case that the plaintiff should have the legal title, *Hull v. Vaughan*, 6 Price, 57; but unless the defendant came in under the plaintiff, or has recognised his title, he can only recover rent from the time of the legal estate being vested in him; *Cobb v. Carpenter*, 2 Camb. 13. Where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that it could not impeach C.'s title, *Rennie v. Robinson*, 1 Bing. 147; but where land belonging to a parish was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease in an action for use and occupation by B. against A., it was held that A. was not estopped by having paid rent to the churchwardens from disputing B.'s title, and that B. could not derive a valid title from the churchwardens; *Phillip's v. Pearce*, 5 B. and C. 483.

† Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages; but where there is no express agreement as to rent, the value of the premises must be proved; and where A. took a farm under an agreement, which he never signed, and the material terms of which the lessor failed to fulfil, it was held that the jury might not ascertain the value of the land without regarding the amount of rent reserved by the agreement; *Tomlinson v. Jay*, 2 B. and B. 680.

‡ On this subject, see *Saunders on Uses and Trusts*; *Gilbert*, Ed. by *Sugden*, 1 Cruise. Dig. 353. et seq.

§ The original simplicity of the common law admitted of no immediate estate in lands

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which was not clothed with the legal seisin and possession thereof. But in process of time a right to the rents and profits of lands, whereof another person had the legal seisin and possession, was introduced, and, though not recognized for a long time by the courts of common law, was, notwithstanding, supported by the Court of Chancery, and became well known by the name of a Use. The introduction of this novelty, though at first it appears to have been but a trivial innovation, has in its progress produced a revolution in the system of real property, and given rise to a mode of transferring land very different from that which the old law had established. A use was created in this manner:—The owner of the lands conveyed them by feoffment with livery of seisin to some friend, with a secret agreement that the feoffee should be seised of the lands, to the use of the feoffor, or of a third person. Thus the legal seisin was in one, and the use or right of the rents and profits in another. It is uncertain when this distinction between the legal seisin and the right to the rents and profits was first introduced; but it is clear that the practice of conveying lands to one person to the use of another did not become general until the reign of Edward III., when the Ecclesiastics adopted it in order to evade the statutes of Mortmain, by procuring conveyances of land to be made, not directly to themselves, but to some lay persons, with a secret agreement that they should hold the lands for the use of the Ecclesiastics, and permit them to take the rents and profits. The idea of a use, and the rules by which it was first regulated, are now generally admitted to have been borrowed by the Ecclesiastics from the fidei commissum of the civil law; Bac. Read. 19; 2 Bl. Com. 327, 328; 1 Cra. Dig. 393. And by analogy thereto the clerical Chancellors assumed the jurisdiction of compelling the execution of uses in the Court of Chancery, and enforced this jurisdiction, by devising, or rather adopting from the common law courts, the writ of subpoena, to oblige the feoffee to attend in court, and disclose his trust; 3 Reev. Hist. 192. The use, of which a definition has been given above, consisted of three parts:—That the feoffee take the profits; that the feoffees upon request of the feoffor or notice of his will, would execute his estates to the feoffor or his heirs, or any other by his direction; that if the feoffee had been disseised, and so the feoffor disturbed, the feoffee would re-enter or bring an action to re-continue the possession; Bac. 10; 1 Saund. 2. This right in equity to the rents and profits of the land, which constituted a use, was not issuing out of the land, but was collateral thereto, and only annexed in privy to a particular estate in the land; that is to say, the use was not so attached to the land, that when once created, it must still have existed, into whose hands soever the lands passed, as in the case of a rent, a right of common, or advowson appendant; but it was created by a confidence in the original feoffee, and continued to be annexed to the same estate, as long as that confidence subsisted, and the estate of the feoffees remained unaltered. So that, to the execution of a use, two things were absolutely necessary; namely, confidence in the person, and privy of estate; 1 Co. 122. a.; Plowd. 252; Poph. 71, 72. Confidence in the person signified that the trust was reposed in the feoffees, and arose from the notice which was given them of the use, and of the persons who were intended to be benefitted by the feoffment; Ibid. The idea of confidence in the person was at first extremely limited, for it only extended to the original feoffee; but it was settled in the reign of Hen. VI., that a subpoena would lie against all those who had notice of the former uses, although they did pay a valuable consideration; Keil. 42. But if a feoffee to uses enfeoffed a stranger of the land for valuable consideration, who had no notice of the use, as there was no confidence in the person either expressed or implied, the use was destroyed, and the new feoffee could not be compelled to execute it; 1 Co. 122. a. With respect to privy of estate, it is observable, that a use was a thing collateral to the land, and only annexed to a particular estate in the land, not to the mere possession thereof; so that, whenever that particular estate in the land to which the use was originally annexed was destroyed, the use itself was destroyed. Therefore the disseisor, the lord by estreat or forfeiture, or tenant by courtesy or in dower, although they had full notice of the use, yet they were not liable to perform the trust, because they were not in, in the per, that is, in privy of the estate to which the use was annexed; but claimed an estate paramount to that which was liable to the use; Ibid. With respect to the persons who were capable of being feoffees to uses, all private persons whom the common law enabled to take lands by feoffment might be seised to a use, and were compellable in Chancery to execute it. A feme covert an infant, though under years of discretion, might be seised to a use; Bac. Read. 58. But no corporate body could be seised to a use, because the Court of Chancery could not issue any process against them to execute the use; and a corporation cannot be intended to be seised to another's use; Plowd. 102.

Neither could the king, nor the queen regnant on account of their royal capacity, be seised to any use but their own, that is, they might hold the lands, but were not compellable to execute the use; Bac. 56. So a queen consort could not be seised to a use; Bac. 57. With respect to the species of property which might be conveyed to uses, it was held that nothing whereof the use was inseparable from the possession, such as annuities, ways, commons, &c. *que ipso usu consumuntur*, could be granted to a use, but that all corporeal hereditaments, as also incorporeal inheritances, which were in esse, as rents, advowsons in gross, local liberties, and franchises, might be conveyed to uses; W. Jones, 127. The rules by which uses were governed were derived from the civil law, and differed materially from those by which real property was regulated in the courts of common law. Hence Lord Bacon observes, that uses stood upon their own reasons, utterly differing from estates

II. RELATIVE TO USES IN GENERAL SUBSEQUENT TO [ 233 ]  
THE STAT. 27 HEN. 8. c. 10.\*

(A) OF THE PERSON SEISED TO A USE.†

(B) OF WHAT ESTATE A PERSON MAY BE SEISED TO A USE.‡

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of possession; Read, 13. Thus by the common law a feoffment was good without any consideration, but uses could not be raised without a consideration; *Ibid.* Uses were alienable, *Id.* 16; and by the stat. 1 R. 3. c. 1. *cestui que use* in possession might have conveyed the legal estate without the consent of the feoffees. In the alienation of uses, which might be by any species of deed or writing, except a feoffment and livery, which was foreign to its nature, no words of limitation were necessary; 1 Cor. 87. b., 100. b. Uses might be limited so as to change from one person to another by matter subsequent, as upon the happening of some future event. For, though the rules of the common law do not allow a fee simple to be limited after a fee simple, yet the Court of Chancery admitted the species of limitation to be good in the case of a use; Bac. 18. So uses were revocable; 3 Ch. Ca. 66.

Uses were devisable, although at that time lands were not; Bac. 20; 1 Co. 123. b. Uses however, were descendable according to the rules of the common law respecting estates of inheritance; Bac. 11; 2 Rol. Abr. 780. A use not being considered an estate in the land, was not an object of tenure, and was therefore freed from all those oppressive burthens which were the consequence of the feudal system, viz. wardship, marriage, relief and escheat. But *cestui que use*, in respect to the legal ownership of the land, had neither *ius in re* nor *ad rem*, 1 Cor. 121. b.; W. Jones, 127; Bac. Uses, 5; therefore when in possession, he was considered merely as a tenant by sufferance; Bro Feoff. Al. Uses, 39; Plowd. 3. a.; 22 Vin. 286. Pl. 3. He could not bring an action, avow, nor justify for damage feasant, in his own name; Bro. Feoff. Al. Uses, Pl. 39. 136. So, his wife was not dowerable of the use, Perk. s. 349; and the husband of feme *cestui que use* could not have his curtesy; *Ibid.* 463; 1 Cor. 123. b. *Cestui que use* did not forfeit his lands for treason nor felony, Jenk. Cent. 190; and the use was not considered as assets in the hands of the heir nor executor to satisfy creditors; 1 Cor. 121. b.; 1 Sand. 60, 61. *Cestui que use*, indeed, might have been sworn upon an inquest, but this rule was established under particular circumstances. As to the feoffee, he was a complete owner of the land at law; he performed the feudal duties; his wife had dower, Bro. Feoff. Al. Uses, Pl. 10; and his estate was subject to wardship, relief, &c.; he had power of selling the lands, and forfeited them for treason or felony. In short, he might have brought actions, and have exercised every kind of ownership over or in respect of the lands; Dy. 96; Jenk. 190; 1 Sand. 62. Such was the state of uses at the time when it was deemed expedient to pass the stat. 27 Hen. 8. c. 10. commonly called the Statute of Uses, which enacts, "that when any person shall be seised of any lands to the use, confidence, or trust, of any other person or persons, by reason of any bargain, sale, feoffment, fine, recovery, contract, agreement, will, or otherwise, then and in every such case the persons having the use, confidence, or trust, shall from thenceforth be deemed and adjudged in lawful seisin, estate, and possession of and in the lands, in the same quality, manner, and form, as they had before in the use."

\* Whatever might have been the intention of the legislature, the stat. 27 Hen. 8. c. 10. certainly did not abolish the practice of conveying to uses; it has merely destroyed the intervening estate of the feoffees or grantees, and thereby converted the equitable into a legal estate, 1 Saund. 80. 82. With respect to the circumstances necessary to the execution of uses by statute, they are, 1st. A person seised to the use of some other person; 2nd. A *cestui que use in esse*, and, 3rd. A use *in esse* in possession, remainder, or reversion; 1 Cor. 126. a.

† The statute expressly requires that there should be a person seised to the use of some other persons. The words are, "Where any person or persons stand or be seised, or at any time hereafter shall happen to be seised of and in any honours, &c., to the use, confidence, or trust, of any other person or persons;" it will, therefore, be necessary in this place to inquire; first, what persons are capable of being seised to uses; and, secondly, of what estate or interest they can be seised. All those who were capable of being seised to uses before the statute may be seised to a use. On the other side, all those who were incapable of being seised to uses before the statute, still labour under the same incapacity.

‡ With respect to the estate of which a person may be seised by uses, it is observable, that the word "seised" extends to every estate of freehold; though it seems that, before the statute, all feoffees to uses must have been seised in fee; 1 Saund. 40. It was formerly much doubted whether a tenant in tail could be seised to a use, Couper v. Franklin, 2 Cor. 78. a.; 3 Bulst.

## (C) OF THE CESTUI QUE USE.\*

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## (D) OF A USE IN ESSE, IN POSSESSION, REMAINDER, OR REVERSION.†

184; Cro. Jac. 400; Moor, 848; 1 Rol. Rep. 384; 2 Rol. Abr. 780; Shep. Touch. 509; Jenk. 195; but it seems to be now settled, that the statute will execute a trust declared upon the estate of a tenant in tail; Godb. 269; Bac. 57, 58; Dy. 811. b.; 1 Sand. 85; 1 Crw. Dig. 427. And it is clear that the statute will execute the use declared upon the seisin of a grantee for life; but such use will determine, together with the legal estate transferred to it by the statute, upon the death of the tenant for life, Dy. 186. a.; Crawley's case, Cro. Eliz. 721; Cro. Car. 231; Williams v. Jekyll, 2 Ves. 682; with respect to what kind of property may be conveyed to uses, it is observable, that the words of the statute comprehend every species of real property in possession, remainder, or reversion; and therefore not only corporeal hereditaments, but also incorporeal ones, as advowsons, rents, &c., may be conveyed to uses. Nothing however can be conveyed to uses but that whereof a person is seised at the time; for in law every disposal supposes a precedent property, and therefore no man can convey a use in land of which he is not in possession, when the conveyance is made; Cro. Eliz. 401; 2 Rol. Abr. 790. Copyhold Estates, also, are not within the statute; Co. Copy-l. s. 54; Gilb. Ten 182; Cowp. 709. A *cestui que use in esse* is necessary to the execution of a use by this statute; if therefore a use be limited to a person not in *esse*, or to a person uncertain, it will be void; Bac. 42. 60.

\* The next circumstance necessary to the execution of a use by this statute is that there must be a *cestui que use in esse*; if, therefore, a use be limited to a person not in *esse*, or to a person uncertain, the statute can have no operation. But by the words of the statute a *cestui que use* may be entitled to an estate in fee simple, or fee tail, term for life or years, or otherwise, or in remainder or reversion. With respect to those who may be *cestui que use*, all persons who are capable of taking lands by any common law conveyance may also have a use limited to them. By the words of the statute corporations may be *cestui que use*. Although a man cannot by conveyance at common law limit an estate to his wife, yet he might have a feoffment to her use, or a covenant with another to stand seised to her use. And a use now raised by a man to his wife will be executed by the statute. The *cestui que use* must in general be a different person from him who is seised to a use; for the words of the statute are, "Where any person or persons" &c.; and Lord Bacon says, "The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate." Thus where lands were given to a man and his wife *habendum* to the said husband and wife to the use of them and the heirs of their two bodies; and, for default of such issue, to the use of A. B.; the question was whether the husband and wife had an estate tail, or only an estate for their lives. It was adjudged that they took an estate tail. There are however some cases where the same person may be seised to a use, and also *cestui que use*. Thus, if a man makes a feoffment in fee to one; to the use of him and the heirs of his body, in this case for the benefit of the issue, the statute, according to the limitation of the uses, directs the estate vested in him by the common law, and executes the same in himself by force of the statute, and yet the same is out of the words of the statute, which are, "To the use of any other person." And here he is seised to the use of himself.

† A use in *esse*, in possession, remainder, or reversion, is another circumstance necessary to the execution of a use, by this statute, 1 Co. 126, a. When all these circumstances concur, the possession and legal estate in the land out of which the use is granted is immediately taken from the feoffee to uses, and vested in the *cestui que use*; and the possession thus transferred is not a mere seisin or possession in law, but an actual seisin and possession in fact; not a mere title to enter upon the land, but an actual estate; and consequently it is subject to escheat, to curtesy, dower, and all the incidents to

which a legal estate is liable; Bac. Read, 416; 1 Sand. 112, 113; 1 Cru. Dig. 433. Rents conveyed or limited to uses are executed by the statute, and the *cestui que use* is entitled to all remedies and rights relative thereto, but not to collateral rights, *Boscawen and Herle v. Cooke*, 1 Mod. 223; 2 Mod. 138. The fourteenth section of the statute of uses, which vests in *cestui que use* the same or the like advantage, benefit, voucher, &c., is expressly confined to estates made before the 1st of May, 1536, and from this circumstance there is ground to suppose that none of these benefits would have been carried to the *cestui que use* by the general words of the act. But it is clear that *cestui que use* is entitled to all benefits and advantages inherent to the estate, and to covenants running with the land; *Appowel v. Monnoux*, Mod. 97; 3 Leon. 225; *Smith v. Tyndal*, 2 Salk, 685; *Roll v. Osborne*, Mod. 859; Pl. 1180. It is said however that, as the statute only transfers the legal estate to the use, it does not interfere with the title deeds; and, therefore, that the feoffee or grantee to uses is entitled to them; *Estoffe v. Vaughan*, Dyer, 277. a.; *Stockman v. Hampton*, Cro. Car. 441; *Huntington v. Mildmay*; Cro. Car. 217; *Reynell v. Long*, Carth. 315; *Whitfield v. Fausset*, 1 Ves. 387. 394; 3 T. R. 154; 1 Saund. 112; 4 Cru. Dig. 203, 204. The third section of the statute contains a saving "to all and singular those persons and to their heirs, which be, or hereafter shall be, seised to any use, all such former right, title, entry, interest, possession, rents, customs services, and actions, as they, or any of them, might have had to his or their own proper use in any manors, lands, tenements, rents, or hereditaments, whereof they be, or hereafter shall be, seised to any other use, as if this act had not been made;" in consequence whereof no term for years or other interest, of which a person to whom the lands are conveyed to uses is possessed in his own right, will be merged by such conveyance; 7 Cor. 19. 13. 20. a.; *Ferress and Curson v. Ferman*, Cro. Jac. 643; *Cook v. Fountain*, 1 Vent. 195. 280; 3 Prest. Conv. 364. 373. The necessity of supposing some person to be seised to a use before it can be executed by the statute, gave rise to the doctrine of a possibility of seisin or *scintilla juris*, in feoffees, releases, &c., to uses, when all actual estate is taken from them by the operation of the statute. This possibility of seisin is supposed to exist in two particular cases; first, upon the limitation of springing uses; secondly, upon the creation of contingent uses. 1st. If a feoffment or lease and release be made, a fine levied, or recovery suffered to A. and his heirs, to the use of B. and his heirs, until C. pay a sum of money, and then to the use of C. and his heirs, in this case the use is executed in B. and his heirs by the statute; and as this use is co-extensive with the seisin of A., there can be afterwards no actual seisin remaining in him; but when C. pays the money, the former use to B. ceases, and a new use springs up, and is executed to C. in fee. The question is, out of whose seisin is the secondary use to be served? It cannot be served out of the possession of B. because he is *cestui que use*; nor out of the original seisin of the feoffor, &c., because the livery, &c. entirely divested him of all possession whatever; 1 Leon. 269. Neither could the use to C. be executed until payment of the money, because the two uses could not exist at the same time. To avoid these difficulties, it was said that the use should arise out of the original seisin of A., the grantee; that, although no actual seisin remained in him after the execution of the use to B., yet upon the cesser of the use limited to B. the original seisin reverted to A. for the purpose of serving the secondary use to C., and that before the money was paid; this possibility of reverter of the original seisin should be considered as a possibility of seisin or *scintilla juris*. 2dly. A feoffment is made to J. S. in fee to the use of A. for life, remainder to the use of his first son unborn in tail, with remainder to the use of B. in fee; does any, and what seisin remain to J. S. until the birth of a son of A? The solution of this question formed the great difficulty in *Chudleigh's case*; 1 Cor. 120. a. On the one hand, it was said that an actual estate in remainder vested in J. S. to serve the contingent use, when it came in *esse*; whilst others were of opinion that no part of the original seisin remained in J. S., and that the contin-

## [ 236 ] III. RELATIVE TO THE LIMITATION OF USES SUBSEQUENT TO THE STATUTE.\*

gent use, when it should arise, must be served out of the former seisin of the grantee; that is to say, that, as the whole seisin was taken out of J. S., so much of it as was necessary to serve the contingent use when it came in *esse* should remain in the preservation and custody of the law, and should not return to or revert in him. But both these opinions were considered erroneous; for, with regard to the first, as the use was limited to A. for life, remainder to B. in fee, this was commensurate to the whole fee, and did not admit of any intervening estate until that limited to the son should arise; besides, if J. S. had vested estates in remainder, he might enter for a forfeiture, and punish waste, &c.; and it is clear that the parties intended him no such benefit. With respect to the second notion, it was thought to be against the words and meaning of the statute, which requires the grantee to be seised at the time of the execution of the use. But the true construction appears to be, that J. S. had not an actual estate or seisin during the suspense of the contingency; nor is the whole seisin taken from him, but that the possession is executed according to the limitation of the uses; that, as a new use will arise upon the birth of A.'s son, so as to proceed the limitation to B., so, upon that event a seisin, co-extensive with the estate in use, limited to such son, will vest in J. S. for the purpose of serving it, and that until the contingency happens, J. S. has a mere possibility of seisin, which may never become actually vested in him; 1 Saund. 103. 106; Booth's Opin. at the end of Sheph. Touch.; Maundrell v. Maundrell, 10 Ves. 255.

\* With respect to the rules applicable to limitations of uses since the statute, it is settled that the same words which are necessary to create an estate in fee upon a conveyance at common law are equally necessary upon a conveyance to uses since the statute; Corbet's case, 1 Cor. 87, b; Jenk. 332. Pl. 65; Foster v. Romney, 11 East, 594; Abraham v. Twig, Cro. Eliz. 478. So, the word "heirs" is equally necessary to create an estate tail in deeds operating by way of use, as in conveyance at common law; Nevil v. Nevil, 1 Roll. Abr. 837; 1 Brownl. 152; Makepeace v. Fletcher, Com. Rep. 457. But with respect to words regulating or modifying an estate, words of modification of less definitive import than those required in common conveyances will suffice in a deed operating by way of use. Thus it has been determined that the words "equally to be divided" will create a tenancy in common in a conveyance to uses as well; Rigden v. Vallier, 2 Ves. 252; 3 Atk. 731; Goodtitle v. Stokes, 1 Wils. 341; 2 Vent. 365; 2 Prest. Conv. 471, Stratton v. Best, 2 Bro. C. C. 233; 2 Cas. & Op. 279.

As to the cesser of the estate of tenant in tail during his life, we have seen that it is a maxim of law, that a condition or limitation annexed to an estate ought to destroy the whole of the estate to which it is annexed, and not a part only of it; 1 Cor. 86, b.; 4 Burr. 1941. This rule is applicable to limitations by way of use which operate so as to defeat or void estates; therefore, if an estate be limited to the use of J. S. in tail, with a proviso that if he do such an act his estate shall cease during his life, this proviso is void; 1 Cor. 86, b.; et vide Cholmley v. Humble, cited 1 Cor. 36, a.; Corbet's case, Ibid. 83, b.; Mildmay's case, 6 Co. 40, a.; Tarrant's case, Moor, 470. However, as a condition may be annexed to an estate tail to determine it wholly by the re-entry of the donor or his heirs, Croker v. Trevillian, Cro. Eliz. 35; 1 Leon. 292; so, a limitation by way of use may enure or defeat an estate tail; as, if tenant in tail were dead without heirs of his body; Mary Portington's case, 10 Co. 36. This doctrine has given rise to the introduction of two species of provisos in modern practice. The one is adopted in the settlement of estates where it is intended that the person in possession of them under the settlement should use the name and bear the arms of the settler, and, in case of refusal or neglect, that the uses and estates thereby limited shall cease and determine. as if the person so refusing or neglecting, being tenant for life, were

dead, or, being tenant in tail, were dead, without issue, inheritable under the entail, 1 Saund. 120; et vide, for the form of such power, Ibid. Appendix, No. 1; 2 Bridg. Con. 8, 10, 469, 575. The other proviso is used in settlements for the purpose of defeating the estate, and limiting or shifting the use, upon that event, to another person, as if such tenant in tail were dead without issue; 1 Saund. 120; Ibid. Appendix, No. 2; 1 Bridg. Con. 304; Nicolls v. Sheffield, 2 Bro. C. C. 215; Doe v. Heneage, 4 T. R. 13; Stanley v. Stanley, 16 Ves. 491. It is also observable that a man cannot make a fraction in an estate, in the case of a limitation by way of use, which cannot be done in a conveyance by livery in possession. Therefore, if a man makes a feoffment in fee of land to the use of A. and his heirs every Monday, and to the use of B. and his heirs every Tuesday, and to the use of C. and his heirs every Wednesday, these limitations are void; per Walmsley, J. 1 Cor. 87, a. Nor can uses be limited so as to abrogate the law. Thus, if there be a limitation to the use of A. and his heirs provided that he give a mortal blow to any person, the use shall cease as to him, and remain over, this is fraudulent to prevent an escheat, and therefore void; Moor, 633; 3 Atk. 180. With respect to limitations of uses, and creation of legal estates by the statute, which differ from the rules of the common law, it is observable that at common law, if a feoffment had been made to a stranger and the feoffor, the stranger took the whole, Perk. s. 203; but now, a feoffment be made if to the use of a feoffor, or to the use of a feoffor and a stranger, it is a good limitation of the use, and the statute executes it in the feoffor alone in the first instance, and in him and the stranger in the second. And this method of vesting the legal estate in the grantor by his own conveyance can be effected by a feoffment, fine, recovery, or lease and release; for in each of these the seisin is conveyed to the feoffee, &c., and that seisin is sufficient to serve uses declared to the feoffor, &c. or to any other person. But in a bargain and sale, where the use first passes, and then the possession is executed in the bargainee by the statute, no other use can be declared upon his estate, according to the rules that a use cannot be limited to arise out of a use; Dyer, 155. a. b.; 1 Cor. 136. b. 137, a. And yet a man could not at common law convey to himself; so neither could he make a conveyance to his wife; Moyses v. Giles, 2 Vern. 385; Lucas v. Lucas, 1 Atk. 271, n. 2, last edition. But by limiting a seisin to the feoffee, release, &c., he may declare the use to his wife, which will be executed by the statute. By the common law we have seen a man could not make his own heir a purchaser, even of an estate tail; but a man may limit the uses so as to make his heirs special take either by purchase or descent; Wills v. Palmer, 5 Burr. 2615; 2 Bla. Com. 687; Tippen v. Cosin, Carth. 272; 4 Mod. 380; Else v. Osborn, 1 P. Wms. 387; Fearn. Cont. Rem. 54, 62, 4th edit. A grantor, however, cannot, even under a conveyance which operates by way of use, enable his heir general to take a remainder as purchaser under a limitation to his heirs; but where the limitation is to the right heirs of the grantor, the use so limited is construed to be the old use, and will be executed in him as the reversion in fee, and not as a remainder; 1 Cor. 129, b. 130, a.; Godolphin v. Abingdon, 2 Atk. 57; Fenwick v. Mitford, Moor, 284; 1 Leon. 182; Read v. Errington, Cro. Eliz. 321; Earl of Bedford's case, Moor, 781; 1 Cor. 130, a.; Cro. Eliz. 334; Bingham's case, 2 Co. 91. b. So, it is a rule of law that, if an estate be conveyed to two, the one being capable and the other incapable, at the time of the grant, he who is capable shall take the whole, 1 Co. 100. b.; 13 Co. 57; and the joint tenants cannot take at different periods; 2 Roll. Abr. 417, Pl. 3. But since the introduction of uses, if A. make a feoffment in fee to the use of B. and his wife, that shall be, though the whole estate vest in B. at first: yet upon his marriage the wife shall take jointly with him; Mutton's case, Moor, 96; Dyer, 274, b.; 1 Cor. 101, a.; Samme's case, 13 Co. 57; Wells v. Fenton, Moor, 634; Stratton v. Best, 2 Bro. C. C. 233. No estate of freehold can, by the common law, be granted to commence in future; Barwick's case, 5 Co. 94, b.; 2 Vent. 204; Roe v. Tran-

[ 238 ] mer, 2 Wils. 75. Neither can a contingent remainder be supported without an express particular estate of freehold. But in conveyances to uses the Courts have supported these future limitations, when no particular estate has been created, either in the shape of remainders, or as springing uses; 1 Atk. 586; 1 Saund. 128, 129.

Thus, if a man covenant to stand seised to the use of the heirs of his own body, Car. 263; 22 Vin. 283. Pl. 2. and the cases cited in the note there; or to the use of another after his own death, Osman v. Sheaf, 3 Lev. 370; Roe v. Tranmer; or if he bargain and sell his lands after seven years, Bac. Uses, 63; in each of these cases the grant is good, and until the event takes place the use results; 1 Sand. 129. But in conveyances operating by way of transmutation of possession, it is necessary that a present seisin should be transferred, in order to serve the resulting use. Thus if a feoffment, or lease and release, be made to J. S. and his heirs, to the use of J. L. and his heirs, to commence four years from thence, or after the death of the grantor, the limitation of the use to J. S. is good; for during the four years, or the life or the grantor, it will result and be executed; 2 Salk. 675. But if the conveyance had been to J. S. and his heirs, after the death of the grantor, to the use of J. S. and his heirs, it would have been void, because it is the grant of an estate of freehold to commence in futuro; Roe v. Tranmer, 2 Wils. 75; Lamb v. Archer, 1 Salk. 225. When a feoffment is made to A. and his heirs, to the use of the heirs of the body of the grantor, the limitation to the heirs of the body takes effect upon the death of the grantor, not as a springing use, but as a remainder; and the use resulting to the grantor for his life, by way of particular estate, the grantor, by the union of the particular estate and the remainder, becomes tenant in tail in possession, 1 Rol. Rep. 240; 22 Vin. 283. and the cases cited in note to Pl. 25; 2 Freem. 235. Pl. 307. 258. Pl. 326; 1 Sand. 97, 98. If the whole fee had resulted to the grantor, the heirs of his body would have taken as purchasers by way of springing use; but the decision is formed upon the true construction of the statute of uses, that so much of the use as the grantor has not disposed of, and no more, results to him; 1 Sand. 130. It is also a maxim of the common law, that no estate can be limited upon a fee-simple: or, in other words, an estate in fee-simple cannot be made to cease as to one, and take effect by way of limitation, upon a contingent event, in favour of another person, Seymour's case, 10 Co. 97. b.; 1 Salk. 231. Pl. 9; Dy. 33. a.; 1 Co. 85. b.; 10 Mod. 423; Plowd. 29; Fearn. Cont. Rem. 4 edit. 8; but it is clearly settled that limitations of this kind may take effect by way of use; Bro. Abr. Feoff. al. Uses, Pl. 423; Harwell v. Lucas, Moor, 99; Earl of Kent v. Steward, Cro. Car. 358. Such a Shifting or springing use, after a previous limitation of the fee, cannot be barred by the *cestui que use* by any kind of conveyance, Lloyd v. Carew, Prec. Ch. 72; Pig. R. 134; Palm 132. 135; Bro. Feoff. al. Uses, Pl. 50; B. N. C. 137; in which respect it differs from a contingent remainder, which may be destroyed; but it agrees with an executory devise after a previous devise of the fee; Pells v. Browne, Cro. Jac. 590; 1 Eq. Ab. 187. However, if a man covenant to stand seised to the use of himself in fee until marriage, and then to the use of himself and his intended wife, and the heirs of his body, with remainders over, he may before marriage destroy the future or contingent uses, by making a feoffment in fee, in tail, or for life, upon a good consideration, and without notice, Wood v. Reignold, Cro. Eliz. 764, 765, 854; cases collected in note to Pl. 4. 22 Vin. 225. and Pl. 224; Gilb. Uses, 125; but a lease for years would not destroy it, although it would bind the future use; Bould v. Wynston, Cro. Jac. 168; 1 Sand. 138.

It is also a maxim of the common law, that every remainder must be limited, so as to await the determination of the particular estate, before it can take effect in possession, Plowd. 24; Fearn. Cont. Rem. 9. 390. 394; Cogan v. Cogan, Cro. Eliz. 360; but it is clear that if a seisin in fee be limited to J. S., to the use of A. in tail or for life, provided that if B. return from Rome, then the lands shall remain to the use of C. in fee; the limitation to C. will vest in abridgement of the estate limited to A.; 2 Leon. 16; 1 Sand. 142.



#### IV. RELATIVE TO ON WHAT CONVEYANCES USES MAY [ 239 ] BE RAISED.

(A) OF THE DISTINCTION BETWEEN CONVEYANCE WHICH OPERATE WITH TRANSMUTATION OF POSSESSION, AND THOSE WHICH OPERATE WITHOUT IT.\*

(B) OF A BARGAIN AND SALE.† See also *ante*, tit. Bargain and Sale.

So, we have seen limitations which operate so as to determine the preceding particular estate before its regular determination, may be effected by a species of limitation, which is not properly a remainder, nor condition, but which is distinguished by the name of a conditional limitation; 4 Reev. 509. 510; Plowd. 27, 32, 34, 414; Doug. 727. n. 1; Shep. Touch. 150. With respect to the distinction between shifting uses and conditional limitations, see 1 Sand. 142. 145. Where an estate tail is limited, and a secondary or shifting use is limited upon it, the tenant in tail may by recovery bar the limitations over; Page v. Hayward, 2 Salk. 570; 1 Lev. 35; 1 Sid. 102; Fearn. Cont. Rem. 15, 16. And it is observable, that when an estate in fee-simple is granted or devised, with a shifting use or secondary fee limited upon it, this secondary or shifting use must be expressly limited to take effect within the compass of a life or lives in being, and twenty-one years and (in case of a posthumous child) a few months over, 22 Vin. Abr. 252. Pl. 4: but it is otherwise where the limitation of the use in the first instance is in tail; and the reason of the difference is this:—in the former case, as these kinds of shifting uses are not barrable by recovery, they would tend to a perpetuity, whereas in the latter case there is no danger of a perpetuity, because when the first tenant in tail comes in possession, he may bar it by a common recovery; 1 Sand. 147; Nicholas v. Sheffield, 2 Bro. C. C. 215; Doe v. Hemige, 4 T. R. 13.

\* In order to raise a use by the statute, there must either be a direct or actual conveyance, operating by way of transmutation of possession, or a contract or covenant, operating as a bargain and sale; for a covenant to stand seized to uses for contracts and agreements, which are merely referrible to subsequent conveyances, do not raise uses under the statute; Hore v. Dix, 1 Sid. 25; Heffield v. Pearce, 2 Rol. Abr. 789; Bainton's case, 96. a.; Shep. Touch. 82; Wingfield v. Littleton. Dy. 162. a.; Audley's case, Ibid. 166. a.; Trevor v. Trevor, 1 P. Wms. 622; 1 Eq. Ab. 38; Edwards v. Freeman, 2 P. Wms. 436. 439. 447. The same rule seems to prevail where the covenant is merely executory, and upon which an action of covenant is the proper remedy, in case the covenant is not performed; Blitheman v. Blitheman, Cro. Eliz. 279; Benl. 121. Pl. 153. M. or 122 Pl. 269; Buckler v. Symons, 2 Rol. Abr. 788; Holloway v. Pellard, Moor. 761; 1 Sand. 107. 111.

† We have seen that conveyances derived from the Statute of Uses are of two kinds:—First, where the deed only transfers the use, which is said to operate without any transmutation of possession, because the alteration of the legal seisin and possession is affected by the mere operation of the statute. Secondly, where the legal estate is transferred by a common law of assurance, and a use is declared on such assurance. This is said to operate by transmutation of possession, because the legal seisin is transferred by a common law bargain and sale. This was well known, and often used before the Statute of Uses, it being then a common practice for a person seized of lands to bargain and sell another; in which case, if the consideration was sufficient to raise a use, the bargainer became immediately seized to the use of the bargainee; all which might have been transacted without the formality of a deed. A bargain and sale is therefore a contract by which a person conveys, we have already observed, his lands to another for a pecuniary consideration, in consequence of which use arises to the bargainee; and the stat. 27 Hen. 8. immediately transfers the legal estate and possession to the bargainee. A bargain and sale may be in fee, for life or for years. As a bargain and sale only passes a use, none but those who are capable of being seized to a use can bargain and sell; for there must be a person seized to a use, and a use *in esse* before the statute can have any operation. From which it follows that neither the king nor the queen regnant can convey their lands in this manner. But, as all private persons may be seized to a use, they may convey their estates by a bargain and sale; therefore every person seized in fee simple, fee tail, or for life, may convey his estate by this assurance; and though it was formerly held that there must be an actual seisin in the bargainer; at the time when the bargain and sale was made, for that without a seisin no use could arise; yet this seems general, for in Fox's case it was held that a reversion expectant on a freehold estate might be conveyed by a bargain and sale. And it appears to be

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## (C) OF A COVENANT TO STAND SEISED TO USES.

1. HARRISON v. AUSTIN. T. T. 1793. K. B. 3 Mod. 227. CROSSING v. SCUDAMORE. M. T. 1792. K. B. 2 Id. 17. DOE v. SIMPSON. T. T. 1755. K. B. 2 Wils. 22; S. C. Willes, 673.

Although the proper and technical words are "covenant to stand seized to the use of A." &c. other words will have the same effect.

A settlement was made as follows: If I have no issue, and in case I die without issue of my body, lawfully begotten, then I give, grant, and confirm my lands, &c. to my kinswoman, S. S., to have and to hold the same to the use of myself for life, and after my decease to the use of the said S. and the heirs of her body to be begotten, with remainders over, &c. The question was, whether this amounts to a covenant to stand seized, so as to raise a use to S. without transmutation of the possession. It was contended that it shall be construed to be a covenant to stand seized, though the formal words are wanting to make it so; and for that purpose it was compared to Fox's case, 8 Co. 93; Hob. 277; who, being seized in fee, demised his land to C. for life, remainder over for life, reserving a rent, and afterwards by indenture, in consideration of money, did "demise, grant, and set" the same lands to D. for ninety-nine years, reserving a rent, and the lessee for life did not attain; in which case, there was not one word of any use or any attornment to make it pass by grant; and the question was, whether this lease for years shall amount to a bargain and sale, so that the reversion, together with the rent, shall pass to the lessee without attornment; and it was held, that by construction of law it did amount to a bargain and sale, for the words import as much. And in this case it was adjudged that it was a covenant to stand seized.

now admitted that estates in remainder and reversion may be conveyed by this assurance, provided the right to them be actually vested in the bargainer at the time. As a bargain and sale is merely a conveyance of a use, and as a use cannot be raised without a consideration, it follows that no bargain and sale can be good without a consideration, which must also be a pecuniary one, for the very name of this assurance imports a *quid pro quo*. It is not however absolutely necessary that a consideration should be mentioned in the deed, for an averment of a consideration may be made. If a person, in consideration of a certain sum of money, bargains and sells, this is a good consideration to raise a use, without an averment of any sum in certain, for the quantity of the sum is not material, as any sum, however small, is a sufficient consideration. A person, in consideration of natural love, and for augmentation of the portion and preferment in marriage of his daughter, bargained and sold lands to her. It was resolved that as no pecuniary consideration was given, the deed could not operate as a bargain and sale; Crossing v. Scudamore, 1 Vent. 187. The second kind of conveyance that derives its effect from the Statute of Uses, and operates without transmutation of possession, is called a covenant to stand seized. Formerly, if a person had covenanted and agreed, for himself and his heirs, that for a certain consideration another should have his lands, though the lands did not pass for want of livery, yet the use passed to the covenantee. Now, whenever a covenant of this kind is entered into, if the consideration be sufficient, a use arises out of the seisin of the covenantor, which is immediately executed by the statute in the *cestui que use*, who thereby acquires the legal estate. A person covenanted, in consideration of natural affection, to stand seized to the use of himself for life, and after his death that the said lands should descend or remain to his cousin B. in fee. Resolved by all the judges, that no use was raised by reason of the said disjunctive "remain or descend," and that it was only a covenant. This conveyance being similar in many respects to a bargain and sale, no person can transfer lands by it who is not capable of being seized to a use. It follows, from the same principle, that no species of property can be transferred by a covenant to stand seized, which cannot be conveyed to a use; and the covenantor must be seized in possession, or entitled in remainder or reversion; at the time of the execution of the deed, because the use must arise out of the seisin or right which the covenantor has at the time. A use will arise to a wife without any consideration expressed upon a covenant to stand seized. Natural love and affection for a near relation, or marriage, suffices; but love and affection to an illegitimate child is not a sufficient consideration to raise a use in a covenant to stand seized. A person covenanted in consideration of natural love and affection to stand seized to the use of himself for life, remainder to A., his reputed son (his bastard), for life, &c. He also covenanted to levy a fine or make a feoffment for further assurance. Afterwards he made a feoffment in fee to the covenantee in performance of his covenant to the same uses. It was resolved that no use arose to A., the bastard, by the covenant, for want of a consideration; nor could he take any thing by the feoffment, it being only made for further assurance.

2. *Hore v. Dix*, cited 2 Vent. 319; S. C. Sid. 25.

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A. by indenture between him and B., his son, of the one part, and two strangers of the other part, in consideration of natural love to his son, gave, granted, and enfeoffed to the two strangers, to the use of himself for life; remainder to B. in tail; remainder over; and covenanted with the two strangers, that they should enjoy the said land, to the uses aforesaid. The deed was sealed and delivered, but no livery of seisin was given, nor was there any attornment. Resolved, that no use was raised by this deed; for a covenant with strangers could not raise a use.

A covenant with a stranger that he shall enjoy the land to the use of the covenantor's son will not be good.\*

(D) OF LEASE AND RELEASE†. See also *ante*, tit. Lease and Release.

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(E) OF A DECLARATION OF USES.‡

\* Where a deed is made in consideration of a sum of money, it will not operate as a covenant to stand seised. In the case of a covenant to stand seised, a use will arise to all persons who are within the consideration, but no use will arise to those who are strangers to it. In the case of a covenant to stand seised, the estate continues in the covenantor till a lawful use arises. Thus if a person makes a feoffment in fee to the use of A. for life, remainder to the use of B. for life, remainder to the use of C. in fee; if A. refuses, B. shall take the estate presently. A bargain and sale, and covenant to stand seised, pass no interest but that which the bargainor or covenantor can lawfully transfer. For as nothing but a use passes by these conveyances, and as no use can be greater than the estate out of which it is created, where a use is granted for a greater estate than that out of which it is granted, it is merely void. and the statute executes the possession to so much only of the use as is lawfully granted. No uses can be declared on a bargain and sale, or covenant to stand seised, but to the bargainee or covenantee, because these conveyances only pass a use, and the legal estate and possession is transferred by the operation of the statute so that a use declared on them is a use upon a use.

† Some time after passing of the Statute of Enrolments, a loop-hole was discovered through which its object might be entirely evaded. For, as it seems to be confined in its terms (though it must be confessed rather ambiguously) to cases where an estate of inheritance or freehold, or the use thereof, was to be made to take effect by reason only of a bargain and sale, it was concluded that if a bargain and sale were first made for an estate less than freehold (as for one year) and then the inheritance or freehold were superadded by a separate deed or release, the transaction could not be effected by the statute; and that such release to the bargainee would be valid without his entry upon the lands was a consequence of the strong words in the Statute of Uses, which convert all vested uses at once into estates. This is the origin of the assurance by lease and release, in the form in which it is now commonly used for the conveyance of land; an assurance which unites in itself many advantages. It is preferable to a bargain and sale, and to a covenant to stand seised to uses, because it effects a transfer of the legal estate under the rules of the common law, and, therefore, the declaration of uses upon it needs not to be confined to persons from whom a consideration moves. It is also preferable to a bargain and sale, and still more to a feoffment, because no additional ceremony is necessary to its operation; but the transfer of property in land may be effected by it in any part of the world as instantaneously as the payment of money. And where the subject of conveyance is land in reversion or remainder, it is also preferable to a mere deed of grant, as it makes it unnecessary for the grantee, if his title be called in question, to prove that there was a particular estate in existence at the time of the grant.

‡ Who may declare or limit the use. The king may declare uses upon his letters patent, though, indeed the patent itself implies a use; 2 Bac. Uses, 66. But if the King grant lands to J. S. and his heirs by his letters patent; to the use of J. S. for life. here J. S. has only an estate for life, and the king has the inheritance without any office found; for implication out of matter of record ever amounts to matter of record. The queen may also declare uses; Bac. Uses, 66. An idiot or person of non-sane memory may declare uses upon a fine or recovery, which declaration of uses will continue valid as long as the conveyance upon which the uses are declared remains in force; Mansfield's case, 12 Co. 124; Lewing's case cited 10 Co. 426; but see 4 Leon. 89. and Sir Butler Wentworth's case, cited 2 Ves. 403; 3 Atk. 318; 13 Vin. 305. Pl. 3. and note (M. a.) It is the same with respect to an infant. Therefore, if an infant levy a fine, or suffer a recovery and limit the use thereupon, he cannot avoid a declaration of the use without avoiding also a fine or recovery; Bac. Uses, 67; 2 Co. 58. a.; 10 Co. 42. b.; 3 Atk. 710; Moor. 22. Pl. 78; 13 Vin. 394. Pl. 1; for as the matter of record stands, the law supposes that the conuzor or recoverer was of full age, and the deed to declare the uses, being part of the fine or recovery, shall stand likewise. But a covenant by an infant in consideration of marriage or blood to stand seised to an use is void; Bac. Uses, 67. It seems that a feme covert can not without the consent of her baron, create or limit the use of her lands; Johnson v. Cotton, Skin. 278; And. 161. Pl. 209. in case of Colgate v. Blythe. But if baron and feme levy a fine, or suffer a recovery of lands, of which they are seised in right of the feme, though they ought regularly to join in the declaration of the uses of such fine or recovery,

[ 243 ] yet if the husband in such cases alone declare the uses, his declaration will bind the feme (although an infant); 2 Rol. Ab. 798; 22 Vin. 232. Pl. 2. if she do not dissent to it; Beckwith's case, 2 Co. 57. a.; Moor, 197; Anon. Moor, 22. Pl. 73; Eusber v. Banbong, Dy. 290. a. See the cases collected in the note to Pl. 1; 22 Vin. 232. 1.; for as she joined with her husband in the fine or recovery, the presumption is, if the contrary cannot appear, that she agreed with him in the declaration of the uses. Indeed, if she acquiesce for any length of time after her husband's death in the declaration of uses made by him, she cannot afterwards invalidate the fine or recovery; Swanton v. Raven, 3 Atk. 105. So, if tenant for life and remainder man levy a fine or suffer a recovery, and the tenant for life alone declare the uses, this declaration shall not affect the remainder man; Roe v. Popham Dougl. 25; Argol v. Cheney, 22. Vin. (T. 6.) 236. Pl. 1. and note in the margin. And it should seem that, if the remainder-man seal, and be a party to the deed, in which the tenant for life alone covenants to suffer a recovery, &c. to certain uses, this does not bind the remainder-man, though he afterwards should join in suffering the recovery, &c.; per Master of the Rolls in Nightingale v. Ferrers 3 P. W. 206. But note in that case the person in remainder was an infant; therefore *quære*, joint tenants may each declare different uses of their respective shares; 2 Co. 58. a.; 22 Vin. 236. Pl. 1. Secondly, in what cases a previous limitation of the use shall be controlled by a subsequent declaration by a distinct instrument. We have before had occasion to remark, that in a conveyance by deed, transferring the seisin to a grantee, such as a feoffment or lease, and release, the use is declared by the conveyance, and it scarcely ever occurs in practice, that the use is in that case declaredly an instrument distinct from the deed conveying the seisin. Where the conveyance is by bargain and sale, or covenant to stand seized to uses, the conveyance itself is the declaration of the use. But when the assurance transferring the seisin to serve the uses is by fine or recovery, the uses are limited by deed, executed either before or after the levying the fine, or suffering the recovery; if before, the deed is said to be bad; and if after, to declare the uses of the fine or recovery. It has happened in the case of fines and recoveries, that there have been contradictory limitations of the uses, and from this circumstance several intricate and perplexing points have arisen. If there be a deed, leading the user of a fine or recovery, those uses may be altered, varied, or absolutely revoked, previously to the levying the fine, or suffering the recovery. When the fine or recovery is conformable in time, persons, and other circumstances, with the deed leading to the uses of it, then the variation, alteration, or revocation of the uses may be effected, 1st. By deed or other instrument of as high nature as the preceding deed or instrument, for "*nihil tam conveniens est naturali æquitati unumquodque dissolvi eo ligamine quo ligatum est;*" but in this case a deed; leading the uses of a fine or recovery can not be varied by a mere writing without a seal; Countess of Rutlands case, 5 Co. 26. a. 2d. By the mutual consent of all parties concerned in interest. 3d. It sometimes happens that in the same instrument there are two declarations of the use differing from each other. The rule is that the first declaration shall prevail; and the second shall be void; Southcoate v. Manory, Cro. Eliz. 744; J. C. Moor, 681. by the name of Wilmot v. Knowles; see the case Doe, d. Leicester v. Bigg, 2 Taunt. 109. The first words in a deed, and the last in a will shall prevail; Shep. T. 88; Co. Lit. 112. When the use is limited by the habendum of a deed, and there is in the subsequent part of the instrument a covenant to levy a fine of the same land to different uses if the fine be levied after the seisin out of which the uses are to arise is transferred to the grantee, there is no ground to contend that the use limited after the habendum can be controlled by the declaration of the uses of the fine; for the deed transferring the seisin from which the use is to arise, is perfected upon the delivery of the deed by the operation of the statute of uses; and the subsequent fine, not operating by way of transmutation of possession, but as a confirmation or extinguishment of right, there is no seisin to serve the use limited upon it. It is a more difficult case where the fine is levied of a term preceding the execution of the deed; but even in this case it should seem that the fine would be considered merely as a further assurance, not disturbing but by way of confirmation of the first limitation of the use; Southcoate v. Manory, cited above; 22 Vin. 227. Pl. 8; Oliver v. Gyles, Cro. Eliz. 300. The latter point however, is extremely doubtful. 4th. The general construction upon, and effect of, the declaration of uses. A very slight expression is sufficient to declare the uses of a fine or recovery, no formal set of words being required for that purpose. Therefore whenever the intention of the parties can be collected in the limitation of the uses of a fine or recovery upon any expression in the precedent or subsequent declaration or conveyance, such declaration or expression is sufficient to declare the uses of the fine or recovery; 3 P. W. 208; 1 Ld. Raym. 290; 12 Mod. 162. A covenant for farther assurance, Hob. 275; 13 Vin. 305. O. a. Pl. 2; or a condition of re-entry, 13 Vin. 309. T. a. Pl. 1; may amount to a declaration of the use, and the uses may be declared by deed indented, or by deed poll. The declaration of the uses must be certain, and that especially in three things; in the persons to whom, in the lands, &c. of which, and in the estates by which, the uses are declared; and if there want certainty in either of these, the declaration is not good; and it must be complete in itself, without any reference to indentures or other writings to be made afterwards, for then it is but an imperfect communication, and no complete declaration; Shep. Touch. 519. 6th edit. It is not necessary that there should be a consid-

(F) OF AN APPOINTMENT OF.\* See *ante*, tit. Powers.

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V. RELATIVE TO USES NOT EXECUTED BY THE STATUTE.†

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ration expressed in a deed to lead or declare the uses of a fine or recovery; Har. Co. Lit. 128. a. note 8; 1 Lord Raym. 290.

\* We must distinguish between an appointment and a declaration of a use. The latter is that original disposition of the use by the express consent of the parties, which prevents it from following any implied designation; which the rules of law might otherwise prescribe; but the former is a limitation of the use by a separate instrument derived from and conformable to, a power reserved or contained in the original conveyance, by which the seisin to serve those uses is transferred. The limitation of the uses thus made under the power must necessarily alter, abridge, or suspend, the use previously declared upon such original conveyance; such are the powers usually reserved in settlements of leasing, jointuring, selling, exchanging, and charging. Every appointment when made immediately to the appointee must consequently vest the use or legal estate in him; and therefore if A., in pursuance of a power, limit an estate to B. to the use of C., the use to C. cannot be executed by the statute. But as the use under an appointment, is served out of the original seisin of the feoffees or releases to uses it is capable of the same modifications as the use declared upon the original conveyance. When a person may dispose of an estate either under a power of appointment, or as the absolute owner of it, it is necessary if he wished to convey in pursuance of the appointment that the power should be recited or referred to; but when a disposition cannot take effect but as an appointment or limitation of the use, then there is no absolute necessity that the appointor should notice the power, nor convey in pursuance of it; 12 Mod. 469; *Andrews v. Eumot*, 2 Bro. 297; *Lawson v. Lawson* 3 Bro. 272. The instrument executing the appointment must be accompanied with all the ceremonies required by the power, such a sealing signing and the attestation of witnesses. The deed itself, being merely the limitation of a use served out of a seisin transferred by another deed cannot be considered as an independent conveyance. It is an instrument inapplicable to the transfer of property by a person conveying as the absolute proprietor. Yet an appointment may be, and frequently is, executed by a conveyance which, if not express or implied, referring to the power would operate upon the legal estate. It is generally true, that a use limited by virtue of a power of appointment has relation to the conveyance in which the power is contained; 1 Atk. 560. n. 2. Therefore if an estate be limited to the use of such persons as a purchaser shall appoint, and in default of appointment, to the use of the purchaser and his heirs; until the purchaser exercise the power, he is seised of a base and qualified fee, liable to be defeated by the execution of it; and, if he die without making any appointment, his wife will be clearly entitled to her dower; but if he exercise his power, then a new use springs up, which entirely defeats the intermediate use limited in default of appointment, and of course destroys the wife's right of dower; *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. 246.

† We have seen that for the execution of a use there must be: 1st. A person seised to the use. 2d. A *cestui que use in esse*. 3d. A use *in esse, scil.* in possession, reversion, or remainder. 4th. An estate or seisin out of which the use is to arise; for the words of the statute are, that the estate of such person seised to the use shall be adjudged in *cestui que use*, &c. 1 Cor. 126. a.; and if these requisites do not occur, there can be no execution of the use. Therefore contingent uses, during the suspense of the contingency, cannot be executed by the statute; Bac. Uses. 45; 1 Sand. 194. Uses limited of copyhold estates also are not within the Statute of Uses; Co. Copyh. 54; Cro. Car. 44; 2 Ves. 257. And as the statute was made previously to the Statute of Wills, 32 and 34 Hen. 8. it seems to follow that the former does not extend to devises to uses. But as the testator's intention is generally the guide in cases of devises, it has been repeatedly determined, that if A. devise to B. and his heirs, to the use of, or in trust for, C. and his heirs, or in trust to permit C. and his heirs to take the profits, it shows that the testator intended that C. should have the legal estate in fee, and the law will therefore give the devisee such an operation; 1 Ver. 79. 415; 2 Sulk. 679, 2 Atk. 578; 2 P. Wms. 134; Doe, d. Leicester, v. Biggs, 12 Taunt. 109; *Bridges v. Wolton*, 1 V. and B. 137. But it is clearly settled that in the case of a devise to the use of A. for life, remainder over, this cannot take the effect by way of use executed by the statute, because there is no seisin to serve the use: but still the *cestui que use* will have the legal estate; 1 Sand. 206. So, although a feoffment in fee to the use of the feoffor for life, and after his decease, that J. S. shall take the profits, be an use executed in J. S., yet it is clear that if there be a conveyance in trust to pay over the profits: *Symon v. Turner*, Eq. Ab. 2-3; *Silvester v. Wilson*, 2 T. R. 444; 15 Ves. 371; *Shapland v. Smith*, 1 Bro. C. C. 75; Doe, d. Leicester, v. Biggs, *supra*, or to convey, *Roberts v. Diswell*, 1 Atk. 607; Bac. Uses. 8; or to sell, *Bughaw v. Spencer*, 2 Atk. 578; the legal estate will vest in the trustees, in order to enable them to pay over the profits, or to pay the same to her separate use; *Pybus v. Smith*, 3 Bro. C. C. 340; *Henry v. Parcel*, Feurn. 75; *Nevill v. Saunders*, 1 Vern. 415; *Bush v. Allen*, 5 Mod. 63. As to the extent of the legal estate vested in trustees under trusts of the above description,

[ 246 ] **Usury.****I. RELATIVE TO WHAT CONTRACTS ARE, OR ARE NOT USURIOUS.****(A) REQUISITES TO CONSTITUTE.**(a) *There must be an unlawful intent, p. 246.*(b) ————— *a direct loan, and an agreement to take, &c., p. 248.*(c) ————— *usury at the making of the contract, p. 251.***(B) AS TO BILLS AND NOTES.** See *ante*, tit. Bills and Notes.**II. RELATIVE TO THE QUESTION OF, BY WHOM DECIDED, p. 251.****III. ————— AS TO CONTRACTS IN IRELAND AND THE WEST INDIES, p. 251.****IV. ————— ITS EFFECT, AND OF THE SUBSEQUENT SECURITIES, p. 252.****V. ————— THE PENALTIES OF, ACTION FOR.****(A) WITHIN WHAT TIME TO BE SUED FOR, p. 253.****(B) VENUE IN, p. 253.****(C) PLEA, p. 254.****(D) EVIDENCE, p. 255.****(E) WITNESSES, p. 255.****I. RELATIVE TO WHAT CONTRACTS ARE, OR ARE NOT USURIOUS.\*****(A) REQUISITES TO CONSTITUTE.**(a) *There must be an unlawful intent.***1. NEVISON v. WHITLY. T. T. 1662. K. B. Cro. Car. 501.**

To consti-  
tute usury  
there must  
be an un-  
lawful in-  
tent.

In this case the judges held, to make a contract usurious, there must be an unlawful intent; and therefore an excessive charge of interest arising from an error in computation will not vitiate the agreement, especially where the mistake is attributable to the scrivener or agent.

see *Doe, d. White, v. Simpson*, 5 East. 162; *Jones v. Say and Sele*, 8 Vin. 262; Pl. 19; 3 Bro. P. C. 113; 1 Ves. 144; *Bagshaw v. Spencer*, 2 Atk. 570. 577; 1 Ves. 142. 144; *Gibson v. Rogers*, Amb. 93; *Wright v. Pearson*, Ib. 360; *Harton v. Harton*, 7 T. R. 652. It has been determined that terms of years, or other chattel interests, cannot be limited to uses, as the statute speaks of persons seised to the use of another, and the word "seised" is only applicable to the possession of a freehold estate; *Bac. Uses*, 42. And that no use limited upon a use can be executed by the statute; and therefore if there be a conveyance to the use of A. and his heirs, to the use of B. and his heirs, this use cannot be executed in B.; *Tyrrel's case*, Dyer, 155. a.; *Samback v. Dalton*, 1 Atk. 591. So, if land be limited to A. and his heirs, to the intent or in trust that B. and his heirs may receive a rent thereout to the use of C. and his heirs, the legal estate in the rent will vest in B. by the fifth clause of the statute, because the seisin out of which the rent arises is conveyed to A., and upon the limitation of such rent to B. the statute is satisfied; *Chaplin v. Chaplin*, 3 P. Wms. 229.

\* By the 12 Ann. c. 16. it is enacted that no person shall take upon any contract, directly or indirectly, for loan of any monies or commodities, above the value of 5l. for the forbearance of 100l. for a year, and so after that rate for a greater or less sum, on a longer or shorter time; and that all bonds, contracts, and assurances for payment of any principal or money to be lent, or covenanted to be performed upon or for any usury, whereon or whereby there shall be reserved or taken above the rate of 5l. in the 100l. as aforesaid, shall be utterly void, and that every person who shall upon any contract take, accept and receive, by way or means of any corrupt bargain, loan, exchange, contrivance, shift, or interest of any wares, merchandize, or any other thing whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment, &c. at a greater rate than 5l. per cent. per annum, shall forfeit treble the value of the sum, &c. so lent, &c. The statute avoids all bonds, contracts, and assurances, upon which its operation attaches; and a judgment entered upon a warrant of attorney, tainted with usury, may be set aside on application to the Court; and as the whole security is contaminated, the Court will set aside the judgment without compelling the defendant to repay the principal and interest; *Roberts v. Goff*, 4 B. & A. 92. So, where the grantor of an annuity having agreed with the grantee to redeem, drew a bill for 5,000l. at three years, which the grantee discounted; thus he took 4,083l. 6s. 8d. as the amount of the purchase

2. *MONK v. MARTINDALE*. T. T. 1796. C. P. 3 B. & P. 154.

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The grantor of an annuity having agreed with the grantee to redeem, drew a bill of exchange for 5,000*l.* at three years, which the grantee discounted in the following manner: he took 4,083*l.* 6*s.* 8*d.* as the amount of the purchase money and arrears, advanced 166*l.* 13*s.* 4*d.* to the grantor in cash, and took 758*l.* as interest for three years upon 5,000*l.*

*Per Cur.* In *Richards v. Brown*, Cowp. 770. the transaction in form was the purchase of an annuity, but it appearing that in substance it was a loan under colour of an annuity, the Court held it within the statute of usury. In *Lowe v. Waller*, Dougl. 470. Lord Mansfield says, what is very applicable to the present case, no shift will enable a man to take more than legal interest

For the of fence is not committed if the charge al leged to be excessive is referrible to the trouble, expense, &c. incur red by the lender of the money;

money and arrears; advanced 166*l.* 13*s.* 4*d.* in cash; and took 750*l.* as interest for three years upon 5,000*l.*: held usurious: *Marsh v. Martindale*, 3 B. & P. 151. But the purchase of an annuity for the life of the vendor (thirty two years of age), at six years of purchase, is not usurious, notwithstanding it is made redeemable at the option of the vendor at the end of five years and a half purchase, and by the mistake of the scrivener is styled a loan in the recital of the deeds; *Murray v. Harding*, 2 Blk. 859; 3 Wilson, 390. One sells goods at three months' credit, but stipulates that, in case the money is unpaid, the vendee shall allow him a halfpenny an ounce per month till the debt is discharged. This allowance was according to an usage in that particular branch of trade, but above the legal rate of interest. The contract being bona fide, the sale is not usurious; *Floyer v. Edwards*, Cowp. 112.

And where A. agreed with B. to lend him money to be raised by the sale of stock on the following terms, the stock was to be replaced by a given day; but if not, the sum to be repaid on a subsequent day, with interest equal to the dividends which the stock would have produced: held that the agreement, being bona fide, and not a device to obtain more than legal interest, was not usurious, though such interest exceeded 5 per cent.; *Tale v. Wellings*, 3 T. R. 531. So, an indorsement on a bond, conditioned for payment of 100*l.* by quarterly payments of 5*l.* each, and interest at 5 per cent., that at the end of each year, the year's interest due is to be added to the principal, and then the 20*l.* received during the year is to be deducted, and the balance remain as principal, does not make the transaction usurious, since the year's interest due must be taken to mean legally due; *Ld. Kenyon, C. J. Le Grause v. Hamilton*, 4 T. R. 613; 5 T. R. 367; 2 K. B. 144. So, where the defendant was indebted to the plaintiff in 466*l.* 4*s.* 6*d.*, for which the plaintiff had sued him, but being not able to pay it, he agreed that, in consideration that the plaintiff would forbear his action till 19th November, 1804, upon the defendant's giving him a bond to transfer to him on the 19th November, 1804, so much stock as said sum would purchase at the then present day's prices, which would amount to 908*l.* 11*s.* 7*d.*, together with such interest as the same would have produced as such stock in the mean time: held not usurious; *Maddock v. Rumball*, 8 East, 304.

Where the plaintiffs had made advances to the defendant, and credited him with 25,000*l.*, at a time when the Three per Cents were at 50; in consideration of which, afterwards, in October, when the Three per Cents were at 51 1/4, he undertook to purchase the sum of 50,000*l.* in their names, and to account for the dividends therein, from Midsummer-day then last: held not usurious; *Boldero v. Jackson*, 11 East, 612. And an extorting post-obit, however gross, cannot be considered as usury; *Matthews v. Laws*, 1 Anst. 7. A custom in Liverpool for the banker to strike a balance every quarter, and send the account to the merchant, and then to make that balance a principal to carry interest to the next quarter, is not usury; *Calliot v. Walker*, 2 Anst. 495. An agreement to pay 12*l.* per cent. on the amount of the purchase money is not usurious, though there be a covenant to keep the vessel insured; and that the defendant shall be entitled to his share of the money to be recovered from the underwriters; *Grigg v. Stokes*, Forrest, 4. In an action of covenant upon a deed of partnership, at the expiration of ten years, to repay A. (who had originally advanced that sum) 20,000*l.*, he being to receive 2,000*l.* yearly, and be indemnified against all losses: plea, that the deed was executed by way of colour, and was in effect an usurious agreement to secure to A. 10 per cent.: which pleas, upon issues joined, were negatived by the finding of the jury. Upon error brought, held that, after finding, the Court could take the contract only from the deed; and if there were a partnership, of however unusual a kind, there was a loan of money, and therefore no usury, and judgment affirmed; *Gilpin v. Enderby*, in Error, 5 B. & A. K. B. 954; 1 D. & R. 570; 5 Moore, C. P. 571. Where the lessor of the plaintiff, being possessed of a lease of building-ground, at a reserved rent of 108*l.*, with a covenant to complete certain houses thereon, assigned the same for 2,300*l.*, and then took a lease at 393*l.*, under a stipulation for re-assignment on payment of the said sum of 2,300*l.*, the instruments, although dated on successive days, being all executed together: held, that this was sufficient evidence for a jury to presume that the transaction was a loan and not a purchase, and that whatever form might be given to it by the parties, it would not prevent it from being usurious: *Doe v. Goech*, 3 B. & A. K. B., 664.

### III. RELATIVE TO AS TO CONTRACTS IN IRELAND AND THE WEST INDIES.\*

DEWAR V. SPEIN. T. T. 1789. K. B. 3 T. R. 425.

The 14 Geo. 3. which enacted that mortgages and other securities respecting lands in Ireland and the West Indies reserving interest allowed in those countries shall be valid, though executed in England, did not extend to personal contracts.

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Debt on bond for 1800*l.* made in England. The defendant cravedoyer of the condition, which after citing an agreement made in June, 1769, between C. P. and the plaintiff's father, for the purchase of an estate at St. Christopher's by the former of the latter for 1800*l.*; and it was agreed at the making of that contract, and it was part of the terms thereof, that 1400*l.*, part of it, should remain secured by a joint bond of C. P. and another person to be in that behalf appointed, and who was resident in England; in consequence of which he with H. H. became bound to the plaintiff's father for the 1400*l.* with interest at 6 per cent.: and also reciting that it had been since proposed, and agreed between C. P. and the plaintiff, that the former bond should be cancelled, and a new bond given for the 1400*l.* with interest at 6 per cent. agreeable to the intent of the original contract, the condition of which was that, on payment of 1400*l.* by Phillips or the defendant, with interest at 6 per cent., &c. the bond should be void, pleads, 1st. *non est factum*; 2d. that after the 29th September, 1714, and after the death of the plaintiff's father, and before the making of this bond, it was corruptly, and against the form of the statute, agreed between the plaintiff and P. that the bond so entered into by P. and H. should be cancelled, and that the plaintiff should forbear, and give further time of payment of the sum of 1400*l.* until the 25th of June, 1788, and should for such his forbearance be paid interest on the 1400*l.* in the mean time after the rate of 6*l.* for 100*l.* by the year; and that for securing the payment as well of the 1400*l.* as the interest, &c. this bond was given, with an averment that the former bond was given up to be cancelled by means, &c. The present bond was void.

Lord Kenyon, C. J. The question is, whether a bond given by one person to another, both resident in this country, is valid, though it reserve a greater interest than is allowed by the laws of this country; the 14 Geo. 3. c. 79, which, it has been argued, protects in this case, is an enabling act, extending to particular cases therein mentioned, and does not reach any others. Now it enacts that mortgages and other securities respecting lands in Ireland and the West Indies, reserving interest allowed in those countries, shall be valid, though executed in England; but it does not extend to personal contracts; and if the present attempts were to succeed, it would sap the foundation of the statutes of usury.—The three other judges concurred.

A bona fide debt is not extinguished by being mingled with an usurious transaction. If one instrument be given in lieu of another, void from being tainted with usury, the second is also invalid.†

### IV. RELATIVE TO ITS EFFECT, AND OF SUBSEQUENT SECURITIES.

1. GRAY V. FOWLER. M. T. 1790. C. P. 1 H. Bl. 462.

The question was, whether a *bona fide* debt is destroyed by being mingled with an usurious contract relating to it. The Court were clearly of opinion that the fair debt for the goods sold still subsisted, unimpeached by usurious transactions, and was not a colourable pretence to cover a real loan.

2. TATE V. WELLINGS. M. T. 1789. K. B. 3 T. R. 531.

*Per Cur.* If one instrument be given in lieu of another, void from being tainted with usury, a second one will also be invalid.

\* The statute of 12 Ann. stat. 2. c. 16. s. 1. (against usury) does not extend to Ireland, or the colonies, which for the most part have peculiar laws, fixing the greatest rate of interest at some higher point than in England; but where a loan was made in this country, on the security of property lying beyond the sea, it became a question which legislature should give the rule, and this doubt was in the first place removed by statute 14 Geo. 3. c. 79. which imposed certain restraints on such transactions, and particularly restricted the rate of interest to 6 per cent; this act was afterwards explained by stat. 1 & 2 Geo. 4. c. 51; but now by stat. 3 Geo. 4. c. 47. the last explanatory act is repealed, and the former seems to be superseded; for all such loans both past and future, and the securities for them, are placed on the same footing as if made in Ireland, or in the West Indian colonies, where the mortgaged property is situated.

† A fresh contract made by parties privy to usurious agreements, and in furtherance of it, is void. But a fresh contract made between the same parties in consideration of the



## V. RELATIVE TO THE PENALTIES OF, ACTION FOR. [ 253 ]

## (A) WITHIN WHAT TIME TO BE SUED FOR.

LLOYD v. WILLIAMS. M. T. 1771. C. P. 3 Wils. 250; S. C. 2 Blac. 792.

Debt for 300*l.* on the statute of usury. The writ was sued out and served on the defendant on the 12th of July, 1770; and the declaration was on the next Michaelmas term. On the 31st of March, 1769, John Hinchliffe applied to the defendant to borrow 100*l.*, and it was then corruptly agreed between them that the defendant should lend Hinchliffe 100*l.* for three months, for which Hinchliffe was to pay the defendant 6*l.* 5*s.* by way of advance, and he accordingly received the said 100*l.*, and paid the defendant thereout 6*l.* 5*s.* by way of interest, by advance, and gave the defendant his promissory note for 100*l.*, dated 31st of March, 1769, and payable to defendant, or order, three months after date. Hinchliffe also deposited at the same time certain cabinets and other valuables in the defendant's hands as a collateral security, with power to sell the same; and he accordingly sold one of the said cabinets for 22*l.* 4*s.*, whereupon Hinchliffe, on the 10th of August, 1769, gave the defendant another note of that date, for 78*l.* 19*s.* 8*d.* payable to the defendant, or order, two months after date, which last note was afterwards paid. Whether this action was brought in due time, the stat. 31 Eliz. c. 5, having directed that such actions shall be brought within one year after the offence committed?

De Grey, C. J., and Blackstone, J., inclined to think that the offence was consummated, and completely committed on making the corrupt agreement, and receiving the interest by advance.

## (B) VENUE IN.

SCOTT v. BREST. H. T. 1788. K. B. 2 T. R. 238.

A., by deed executed in London, for securing the repayment of money lent to B., is appointed receiver of B.'s rents in Middlesex, with a pretended salary, which enables him to retain usurious interest; he accordingly receives the rents in Middlesex, but settles the account in London, and there pays the balance upon which the usurious interest is allowed.

Ashhurst, J. This venue is laid very properly in London, and I think more so than if it had been laid in Middlesex. In order to constitute usury, there must be an usurious contract, and an usurious taking. The usurious taking is an essential ground of the action; it was so in this case. It was competent to the plaintiff to appoint the defendant receiver of the rents; and, if the defendant had merely received the rents in that character, the transaction would have been perfectly innocent, so that the defendant would not have been guilty of usury if there had not been an usurious taking. For there the contract was made by which the defendant was appointed the receiver of the plaintiff's rents in Middlesex, and by which he was to pay over the residue to the plaintiff on his receiving the money at Middlesex. He went to London

original usury, or with an innocent party who was not privy to the usury, is binding: thus, a fresh security given for the balance of the debt originally usurious, is void. But where usurious securities have been destroyed by mutual consent, a promise by the borrower to pay the principal and legal interest is binding. If A., for an usurious consideration, give his promissory note to B., who transfers it to C. for value without notice of the usury, and afterwards A. gives a bond to E. for the amount, the bond is valid. But it would be otherwise if A. gave the bond to B. And where A. being indebted to B. for different usurious loans, applies to B. for a further advance, which B. agrees to make at the legal rate of interest provided A.'s father will give his security for it, and also for part of the previous debt; A.'s father consents, and accepts three bills, the two first of which exactly cover the amount of the legal debt; the first is paid when due. In an action on the second, held that the acceptances, having been given partly as a security for an illegal debt, were all tainted with the illegality, and were therefore void; *Harrison v. Hannel*, 1 Mars. 349; 5 Taunt. 780.

\* And where A. lent B. 500*l.*, paying immediately a premium of 50*l.*, and paying interest on the 500*l.* at 5*l.* per cent. for five years, at the end of which time a *qui tam* action was brought, held, that it was in time; *Scurry v. Freeman*, 2 B. & P. 381. Sums and dates not amendable after the time of the limitation has expired; *Dougl.* 14.

† Therefore where a draft was given with usurious interest, and a receipt taken for it in the county of A., and the draft was afterwards exchanged for money in the county of B., the venue is properly laid in B.; *Scurry v. Freeman*, 2 B. & P. 381.

and settled the account with the plaintiff there, and paid him over the balance. But the money was not usuriously received by the defendant till the account was settled, and he insisted on retaining it for his own satisfaction, under the agreement. But even supposing the foundation of this action to have arisen in two counties, I think that, where there are two facts which are necessary to constitute one offence, the plaintiff may *ex necessitate* lay the venue in either county.

## (C) PLEA.

HILL V. MONTAGUE. M. T. 1817. K. B. 2 M. & S. 377. NICHOLL V. LEE. E. T. 1795. Ex 3 Anst. 940.

In debt on a specialty, usury must be pleaded.\*

Debt on bond, that the supposed writing obligatory was made and entered into by the defendant, under and by virtue, and in pursuance of a certain corrupt contract made after the 29th of September, 1714, to wit, on the 16th of February, 1799, at London, in the parish and ward of Cheap, between the plaintiff and the defendant, whereupon and whereby there was reserved above the rate of 5*l.* for the forbearing of 100*l.* for a year contrary to the form of the statute in such case made and provided, whereby and by force of the same statute, the supposed writing obligatory was and is wholly void in law; and this he, the defendant, is ready to verify; wherefore he prays judgment if he ought to be charged with the said debt by virtue of the supposed writing obligatory, &c.; demurrer assigning for cause that the defendant, by his said plea, alleges that the said writing obligatory was made in pursuance of a corrupt contract, &c. in the words of the plea, but does not by his said plea allege or specify any of the particulars of such contract, nor the time of such forbearance, nor the sum to be forborne, nor the sum to be paid for such forbearance, and also for that the said plea is in other respects uncertain.

[ 255 ] Lord Ellenborough, C. J. Usury is not like fraud and covin, which usually consist of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set forth; but has this form of pleading ever been in use before? The corrupt contract ought to be particularly set forth, and the usurious interest, that the party may know what to answer; the party against whom it is pleaded may be aware of the contract, but he cannot know in what particulars it is meant to be assailed, or wherein the other side imputes vice to it.

## (D) EVIDENCE.†

## (E) WITNESSES.

SMITH V. PRAGER. M. T. 1796. K. B. 7 T. R. 60. ABRAHAMS V. BURN. E. T. 1776. K. B. 4 Burr. 2251.

The borrower of money at an usurious interest is a competent witness for the plaintiff.

In order to prove the case, B., borrower of the money was called as a witness, and he gave in evidence, that on the 17th of September, 1795, he borrowed of the defendant 900*l.*, to be repaid on the 3rd of October following, for which he was to pay 1*l.* as interest; that on the 3rd of October, 1795, he borrowed of the defendant 2,000*l.* more, to be repaid on the 26th of the same month, for the loan of which he was to pay 42*l.*, and both the principal sums

\* But in assumpsit, or in debt on simple contract. it may be given in evidence under the general issue.

† The usurious contract, like any other contract, must be proved as alleged; and a variance as to the quantum of usurious interest will be fatal; in this respect an indictment for usury differs from an indictment for taking more than 10*s.* in the pound for brokerage, 17 Geo. 3. c. 26; for there the offence consists in the simple excess being immaterial, a variance from it in evidence will not be material; Rex v. Gillam, 6 T. R. 265. If the declaration states an absolute agreement, and the proof be of an agreement in the alternative, to forbear to the one or other of two days, at the option of the borrower, the variance will be fatal; Tate v. Wellings, 5 T. R. 531. It is sufficient to prove the loan or forbearance by C. to A. according to its substance or legal effect. It is proved by evidence that A. is debtor to B., and B. to C., and of an agreement for an usurious consideration to be paid to C., that he shall take A. as his debtor, although B. join A. in the security to C.: 1 East, 195. So, it would be by evidence of a loan by C. to B., and the giving a note as security by A. to C., more than legal interest having been taken for the forbearance on the note; Manor v. Borton, 3 B. & P. 343. Where usurious interest has been taken by means of an agent, it is not essential to call the agent himself; such a rule, it has been observed, would be very inconvenient; 1 N. R. 103.

and interests were repaid at the stipulated times, by B.'s drafts on his banker, in an action which were duly honoured; that he was still indebted to the defendant in the sum of 400*l.* on a running account for this and other loans of money. B. had before the trial become a bankrupt, and had not obtained his certificate. It was objected at the trial that he was not a competent witness on the ground of interest. Lord Kenyon, C. J., overruled the objection.

**Vagrant.†**

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- I. **RELATIVE TO, IN GENERAL**, p. 256.
- II. **WHO SHALL BE DEEMED AN IDLE AND DISORDERLY PERSON**, p. 257.
- III. **A ROGUE AND VAGABOND**, p. 257.
- IV. **AN INCORRIGIBLE ROGUE**, p. 257.

**I. RELATIVE TO, IN GENERAL.****1. Rex v. Patchett. E. T. 1806. K. B. 5 East, 339.**

By the Vagrant Act, 17 Geo. 2, c. 5, after a rogue and vagabond has been committed to the sessions, and they, adjudging him to be a rogue and vagabond, order him to be further imprisoned and kept to hard labour for six months, and to be publicly whipped during that time; and that, after the expiration of his imprisonment, he should be sent and employed in his Majesty's service, pursuant to the statutes; held, that the whole forms one sentence, and being defective in the latter part for want of adjudicating whether the sentence was by sea or land, the conviction shall be quashed, though the former part be valid. *See ante, tit. Conviction.*

A conviction upon the adjudication of employment in his Majesty's service must state whether by sea or land.

**2. Rex v. Brown. M. T. 1798. K. B. 8 T. R. 26.**

A commitment under the 23 Geo. 3, c. 88, not stating that the defendant was apprehended, with the implements of housebreaking upon him at the time of such apprehension, &c. It was now moved that the prisoner might be discharged out of custody for the insufficiency of the warrant of commitment. The stat 23 Geo. 3, c. 88, which extends the provisions of the general Vagrant Act of the 17 Geo. 2, c. 5, extends to persons only apprehended having upon them any pick-lock, &c., with an intent feloniously to break and enter any dwelling-house, &c., which must mean persons having such implements found upon them at the time of their apprehension. Now there is nothing stated in this commitment to show that the prisoner was apprehended in the predicament mentioned in the act. This cannot be aided by the general Vagrant Act, grounded on a confession of the prisoner that he is a rogue and a vagabond, because it is not the confession of any particular fact which constitutes him such, but the law itself; and therefore will not conclude the party. *Rex v. York*, 5 Burr. 2684, was cited to show that the warrant must quickly pursue the authority given to the magistrate to commit.

And under the 23 Geo. 3, (in execution) must allege that the implements were found on them when apprehended.

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Lord Mansfield, C. J. I yield with great reluctance to the objections but I am afraid it is well founded. *Per Cur.* Prisoner discharged.

**II. RELATIVE TO WHO SHALL BE DEEMED AN IDLE AND DISORDERLY PERSON.†**

\* A witness, to prove usury in a contract between himself and the defendant, cannot be cross-examined as to other contracts which he has made with other persons, in order that it may be inferred, if he answer in the affirmative, that the contract in question was of the same nature, or in order to contradict, if he answer in the negative; *Sponley v. De Willett*, 7 East, 108.

† By the 5 Geo. 4, c. 83, all the provisions previously enacted relative to idle and disorderly persons, rogues, and vagabonds, incorrigible rogues, and other vagrants, are repealed, except only as to offences committed before the passing of the act; The act does not extend to Scotland or Ireland.

‡ By 5 Geo. 4, c. 83, every person being able, wholly or partly, to maintain himself or family by work or other means, and neglecting so to do, where-

### III. RELATIVE TO WHO SHALL BE DEEMED A ROGUE AND VAGABOND.\*

### IV. RELATIVE TO WHO SHALL BE DEEMED AN INCORRIGIBLE ROGUE.†

by they become chargeable to the parish; every person returning to and becoming chargeable to any parish from whence he shall have been legally removed, unless he produce a certificate from the churchwarden and overseer acknowledging him to be settled there; every petty hawk or pedlar wandering abroad and trading without being duly licensed; every common prostitute wandering in the public streets or common highways, or in any place of public resort, and behaving in a riotous or indecent manner; and, lastly, every person wandering abroad, or placing himself in any public place, court, or passage, to beg, or causing any child so to do: all these are deemed idle and disorderly persons within the meaning of the act, and a justice of the peace may commit the offender, by the evidence of one credible witness, to the house of correction, to be kept to hard labour for any time not exceeding one calendar month. Before the 5 Geo. 4, a commitment of a vagrant for deserting his family must have stated them to be chargeable; *Rex v. Hall*, 3 Burr. 1636.

\* By 5 Geo. 4, c. 83, every person committing any of the offences mentioned in the last clause a second time; every person pretending to palmistry or to tell fortunes; every person lodging in any outhouse, or in the open air, not having any visible means of subsistence, and not giving a good account of himself; every person exposing to view in any street or public place, or in view thereof, with intent to insult any female; every person endeavouring, by the exposure of wounds and deformities, to obtain alms; every person going about to collect alms or charitable contributions under a fraudulent pretence; every person running away, and leaving his wife or children chargeable to the parish; every person playing or betting in any street, or other open and public place, at or with any table or instrument of gaming, or at any game or other pretended game of chance; any person having in his pocket any pick-lock, or implement, with intent feloniously to break open any house or building, or being armed with any gun or offensive weapon, with intent to commit any felonious act; every person found in or upon any house or building, or in any enclosed yard, garden, or area, for any unlawful purpose; every suspected person or reputed thief frequenting any river or navigable stream, dock, basin, wharf, quay, warehouse, or any street or way adjacent, with intent to commit felony; and, lastly, every person apprehended as idle and disorderly, and violently resisting such apprehension, and being subsequently convicted of being idle and disorderly: all these are rogues and vagabonds, and a justice of peace may commit such offenders to the house of correction for any time not exceeding three calendar months.

† By 5 Geo. 4, c. 83, every person escaping out of confinement before the expiration of the time for which he has been committed under this act; every person committing any offence which shall subject him a second time to be convicted as a rogue and vagabond; and, lastly, every person apprehended as a rogue and vagabond violently resisting such apprehension, and being subsequently convicted of being a rogue and vagabond: all these are deemed incorrigible rogues and any justice of the peace may commit such offenders, being convicted before him by the evidence of one or more credible witnesses, to the house of correction, to be kept to hard labour, to the next general or quarter sessions of the peace. The 6th section provides, that any person may apprehend offenders under this act, and convey them before a justice, or deliver them into the custody of a constable. Incorrigible rogues, at the next general or quarter sessions, may be further imprisoned for not exceeding one year; and, not being a female, whipped. Constables or other peace officers neglecting to do their duty under this act, or persons hindering them from

**Variance.\***

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**I. RELATIVE TO WRITTEN DOCUMENTS.****(A) CIVIL PROCEEDINGS.****(a) In general.**

1st. As to parties, p. 259. 2nd. As to consideration, p. 260. 3rd. As to promise, p. 260. 4th. As to time and place, p. 261. 5th. In legal effect, p. 263.

**(b) In particular.**

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2nd. In process, p. 268. 3rd. Between pleadings and process, p. 268. 4th. Between pleadings and evidence.

1. Connected with bills and notes, p. 270. 2. Connected with bonds, p. 271. 3. Connected with carriers, p. 272. 4. Connected with contracts.

(a) Generally, p. 273. (b) For sale of goods, p. 274. (c) Respecting real property, 276. (d) Respecting money and securities, p. 277.

5. Connected with character, p. 277. 6. Connected with customs and prescriptions, p. 278. 7. Connected with deeds, p. 279. 8. Connected with horses, p. 281. 9. Connected with libels, p. 281. 10. Connected with mal. proc., p. 282. 11. Connected with penalties, p. 282. 12. Connected with policies of insurance, p. 282. 13. Connected with process, p. 283. 14. Connected with records, p. 284. 15. Connected with rent, p. 286. 16. Connected with slander, p. 286. 17. Connected with warranty, p. 286.

5th. Between pleadings and record, p. 287. 6th. As to statutes, p. 288.

**(B) CRIMINAL PROCEEDINGS, p. 288.****II. RELATIVE TO PAROL EVIDENCE, p. 290.**

doing their duty, forfeit 5*l*. All vagrants are to be searched, and their trunks, bundles, &c., inspected; and, on information on oath, a justice may issue a warrant to search any lodging-house or place suspected of harbouring vagrants. Nothing in the act to restrain any visiting justice of any prison from granting a certificate, enabling any person discharged from such prison to receive alms or relief on their route to their place of settlement.

\* The 9 Geo. 4, c. 15, after reciting that, whereas great expense is often incurred, and delay or failure of justice takes place, at trials, by reason of variances between writings produced in evidence and the recital or setting forth thereof upon the record on which the trial is had in matters not material to the merits of the case, and such record cannot now in any case be amended at the trial, and in some cases cannot be amended at any time, for remedy thereof enacts that it shall and may be lawful for every Court of Record holding plea in civil actions, any judge sitting at Nisi Prius, and any Court of Oyer and Terminer and General Gaol Delivery in England, Wales, the town of Berwick upon Tweed, and Ireland, if such court or judge shall see fit so to do, to cause the record on which any trial may be pending before any such judge or court, in any civil action, or in any indictment or information for any misdemeanour, when any variance shall appear between any matter, in writing or in print, produced in evidence, and the recital or setting forth thereof upon the record whereon the trial is pending, to be forthwith amended in such particular by some officer of the court, on payment of such costs, if any, to the other party as such judge or Court shall think reasonable, and thereupon the trial shall proceed as if no such variance had appeared; and, in case such trial shall be had at Nisi Prius, the order for the amendment shall be indorsed on the postea, and returned, together with the record, and thereupon the papers, rolls, and other records of the court from which such record issued shall be amended accordingly. The above statute having rendered most of the cases on the subject of variance nullities, it has been thought advisable to state the essence of the authorities in the notes, because it is perfectly clear that what was not a variance before the statute cannot be so since.

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## I. RELATIVE TO WRITTEN DOCUMENTS.

## (A) CIVIL PROCEEDINGS.

(a) *In general.*

1st. *As to the parties.\** See also, *ante*, tit. Parties to Actions, and the particular subject matter of the contract.

2d. *As to consideration.*†

3d. *As to promise.*‡

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\* It may be here proper to observe, that it is a fatal variance if it appear that a party who ought to be joined as plaintiff has been omitted, *Graham v. Robertson*, 2 T. R. 282; 1 Saund. 291; but is it no variance to omit a person who might have been joined as defendant; the non-joinder must be pleaded in abatement; *Evans v. Lewis*, 1 Saund. 291. Thus, where the declaration stated a bill of exchange to have been drawn upon and accepted by the three defendants, and it was proved to have been drawn upon and accepted by them jointly with a fourth, it was held no variance; *Mountstephen v. Brooke*, 1 B. & A. 224. Where a contract has been made with two persons, one of whom has since died, and the action is brought upon such contract by the survivor, without stating the fact of his being survivor, it is a fatal variance; *Jell v. Douglass*, 4 B. & A. 374. But it is otherwise with regard to the party against whom an action is brought, who need not be stated to be survivor; for the joint debt may, by reason of the death of the party, be treated as if it had been originally a separate debt; *Richards v. Heather*, 1 B. & A. 29. Where a contract is made by one of several partners (the partnership being really interested), it is no variance that the action is brought in the names of all the partners, *Garrett v. Handley*, 4 B. & C. 664; for the action may be maintained either in the name of the person with whom the contract was actually made, or in the name of the parties really interested; *Skinner v. Stocks*, 4 B. & A. 437.

† It is not necessary for the plaintiff to set out all the several parts of a contract, consisting of distinct and collateral provisions: it is sufficient to state so much of the contract as contains the entire consideration for the act, and the entire act to be done in virtue of such consideration, including the time, manner, and other circumstances of its performance; *Clarke v. Grey*, 6 East, 568; *Parker v. Palmer*, 4 B. & A. 387. The omission of any part of the consideration is a fatal variance. Thus, in assumpsit by landlord against the assignees of a bankrupt, on an agreement to pay ten shillings in the pound for rent due from the bankrupt and themselves, it appeared that part of the consideration was that the plaintiff should accept a surrender, which consideration being omitted, the plaintiff was nonsuited; *Dashwood v. Peart*, *Manning's Index*, 308. So, where the contract declared on was that the defendant should deliver to the plaintiff all his tallow at 4s. per stone, and the contract proved was, that the defendant should deliver it at 4s. per stone and so much more as the plaintiff paid to any other person, the variance was held fatal; *Churchill v. Wilkins*, 1 T. R. 447. It seems that, if the declaration state the consideration to be a certain reasonable reward, evidence that a specific sum was agreed on will not be a material variance. *Semb. per Chambre, J. Bayley v. Tricker*, 2 N. R. 458.

‡ It is only necessary to state so much of the promise, for the breach of which the plaintiff proceeds. But the omission of a qualification in the promise will be fatal. Thus the statement of a general warranty of a horse is not supported by proof of a warranty of soundness, excepting a kick on the leg; *Jones v. Cowley*, 4 B. & C. 445. So, where the plaintiff declared that, for certain hire and reward, the defendant undertook to carry goods from London and deliver them safely at Dover, and the contract proved was to carry and deliver them safely (fire and robbery excepted), the variance was held fatal; *Latham v. Rutley*, 2 B. & C. 20. So, a promise in the alternative cannot be stated an absolute promise; *Penny v. Porter*, 2 East, 2. So, any addition to the promise will be a fatal variance. Thus a contract to deliver soil cannot

4th *As to time and place* \* See also *ante*, tit. Declaration.

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be declared upon as a contract to deliver soil or breeze, if it appear that soil and breeze are different articles; *Clark v. Manstone*, 5 Esp. 239.

So, the omission of any part of the entire promise, for the breach of which the plaintiff proceeds, will be fatal. Thus, where land was alleged to have been demised at a rent of 15*l.* and in evidence the rent appeared to be 15*l.* and three fowls, the variance was held fatal; *Sands v. Ledger*, 2 *Ld. Raym.* 792. But, if the omission does not alter the legal effect of the promise, the variance is immaterial. Thus, where the promise was stated to be to deliver a quantity of gum Senegal, but the contract appeared by the evidence to be for the delivery of rough gum Senegal, the variance was held immaterial, it appearing that all gum Senegal, on its arrival in this country, is called rough; *Silver v. Heseltine*, 1 *Chitty*, 39. So, where the declaration stated that the defendant had agreed to buy a large quantity of head matter and sperm oil, in possession of the plaintiff, which was afterwards ascertained to be a given quantity, and the contract proved was for the purchase of "all the head matter and sperm oil per the Wildman," it was held no variance; *Wildman v. Glossop*, 1 *B. & A.* 9.

\* 1st, as to time:—Where the time is material, or where it is alleged by way of description, it must be proved as laid. Thus, in debt to recover penalties for usury, the day on which the money was lent is material, though laid under a *videlicet*, and a variance from that day is fatal; *Partridge v. Coates*, 1 *R.* and *M.* 153. So, where a writ was described in terms, and, on the production of the writ, it appeared to be returnable on a different day from that stated, the variance was held to be fatal, though the day was laid under a *videlicet*; *Grey v. Rennet*, 1 *T. R.* 656; see also *Rastall v. Straton*, 1 *H. Bl.* 49. So, where the declaration alleged that the defendant on such a day made his certain bill of exchange, bearing date the day and year aforesaid, and the real date of the bill was different, this being a variance in matter of description, was held fatal; *Anon.* 2 *Campb.* 308. But, where time is neither material, nor matter of description, a variance from it will not be fatal. Thus, where the declaration stated that the defendant made his certain bill of exchange on such a day, but not that it bore date on that day, a variance from that day was held to be immaterial; *Coxon v. Lyon*, 2 *Campb.* 307. So, where the declaration alleged that a bill drawn on the 18th of August, and payable sixty days after sight, was afterwards viz. on the day and year aforesaid, accepted by the defendant, and the bill appeared to be accepted on the 19th of September, the variance was held immaterial; *Freeman v. Jacob*, 4 *Campb.* 209. So, where a bill was stated in the declaration to have been indorsed before it became due, and appeared in evidence to have been indorsed after it became due, the variance was held immaterial; *Young v. Wright*, 1 *Campb.* 139; see also *Purcell v. Macnamara*, 9 *East*, 157. So, in trespass, the day is immaterial; but in trespass with a *continuando*, or with a "divers days and times," though the plaintiff may prove any number of trespasses within the time laid, yet he can only prove a single act of trespass before the first day; *B. N. P.* 86; 1 *Saund.* 24.

2d. As to place:—In ejectment, the premises being described as in the parish of Westbury, and it being proved that there were two parishes of Westbury, viz., the Westbury on Trym, and the other Westbury on Severn, held, that this was not a variance; *Doe, d. James, v. Harris*, 5 *M. & S.* 326. In ejectment, the premises being laid to be in Farnham, and proved to be in Farnham Royal, is not a fatal variance, unless it be shown that there are two Farnhams; *Doe, d. Tollet, v. Salter*, 13 *East*, 9. In ejectment, the demise was laid to be by the mayor, burgesses, &c., of the borough town of M., and on the trial it turned out from the charter, that the name of the corporation was the mayor, &c. of M.; held, that this was a variance, it appearing from the charter, which was in evidence, that M. was a borough town; *Doe, d. Malden (Corporation), v. Miller*, 1 *B. & A.* 699.

[ 262 ] In *assumpsit*, for use and occupation, it is not necessary to state in what parish the premises are situated; and if the parish is described by a wrong name, it is immaterial, at least if it be described by a name generally known, and which could not, therefore, mislead the defendant; *Kirtland v. Pounsett*, 1 Taunt. 570. Case for use and occupation of a house, describing it as in a certain parish, if there is no such parish, it is fatal; *Wilson v. Clarke*, 1 Esp. 273; *S. C. Guest v. Caumont*, 3 Camp. 235. a. So, where a declaration described demised lands to be in the parish of B. and M., the deed demised lands in the parishes of B. and M.; the Court held the variance fatal; *Morgan v. Edwards*, 6 Taunt. 394; *S. C. 2 Mash.* 96. Evidence of a house situate in the parish of M. will support an averment of a house at S., S. being extra-parochial, and both places usually going by the name of S.; *Burbidge v. Jakes*, 1 B. & P. 225. The defendant's tenancy of land in F., at a certain rent, was alleged as the consideration for his promise to manage it in a husband-like manner, the land for which the rent was reserved was in F. and C., this was held to be a fatal variance in stating the consideration of the promise; *Pool v. Court*, 4 Taunt. 700.

In a penal action, if a parish is styled by its popular and well-known name it is well enough, though that is not the name of consecration; *Williams v. Burgess*, 3 Taunt. 127. The plaintiff having sued *qui tam*, alleged the loss at the parish of St. James, in the county of Middlesex; held sufficient in error, although in Middlesex there are the parishes of St. James, Clerkenwell, and St. James, in the liberty of Westminster; *Taylor v. Williams*, 3 Bing. 449. In an action for false imprisonment, the declaration averred that plaintiff was a constable of a particular parish, and in due execution of his said office as such constable; and it appearing that, though a constable, inhabiting and acting in this parish, he was elected by the leet and jury, and sworn in to serve for a whole liberty of which the parish formed a part; held to be a fatal variance; *Goodes v. Wheatly*, 1 Camp. 231.

In a declaration of trespass for breaking and entering a house, the premises were laid in the parish of Clerkenwell; it was proved that Clerkenwell consisted of two parishes or districts, though it was generally known by the name of St. James, Clerkenwell; held an insufficient description; *Taylor v. Homan*, 1 Moore, 161; *S. C. Holt*, 523. In an action for an excessive distress the premises were laid to be in the parish of St. George the Martyr, and were proved to be in the parish of St. George, Bloomsbury; held an improper description; *Harris v. Cooke*, 2 Moore, 587; *S. C. 8 Taunt.* 539. Where plaintiff declared that in a certain messuage or dwelling-house, and premises, &c., he distrained for the rent of the said premises with the appurtenants, by virtue of a certain demise thereof, proof of a lease of two messuages, reserving a rent, and of a notice of distress for the rent of two messuages, was held not to be a variance; *Taylor v. Brooke*, 3 M. & S. 169. In an action for non-residence, the parish was styled in the declaration St. Ethelburg; evidence, that the real name was St. Ethelburger; held a fatal variance; *Wilson v. Gilbert*, 2 B. & P. 281. In an action on the case for a nuisance in erecting a weir, and thereby injuring plaintiff's mill, it was described in the declaration to be at Hulbrook, and proved to have been erected at a lower part of the same water, called the Tame Water, the variance was held fatal; *Shaw v. Wrigley*, 2 East, 500. The venue in such case is local, but a local description need not be given; *Mersey and Irwell Navigation v. Douglass*, 2 East, 497. Declaration stated that defendant went before one R. C., Baron Waterpark, of Waterfork, in the county, &c., and the proof was, that he went before R. C., Baron Waterpark, of Waterpark, in the county, &c.; held, that the allegation in the declaration was a description of a name of dignity, and therefore that this was a fatal variance; *Walters v. Mace*, 2 B. and A. 756; *S. C. 1 Chit.* 507.

Declaration by a sailor for wages, and the average price of a negro slave, earned during a certain voyage from the port of London to the coast of Africa, and from thence to the West Indies; at the trial it appeared from the



articles that the voyage was from the port of London upon an intended voyage to the coast of Africa for slaves, from thence to the West Indies or America, and afterwards to London in Great Britain, or to her delivering port in Europe, and that no mention was made in the articles of the average price of a negro slave; held, that the variance between the description of the voyage in the declaration and the articles was fatal, though the captain put an end to the voyage in the West Indies, and discharged the crew there, and though the description of the voyage in the declaration was under a *silicet*; *White v. Wilson*, 2 B. and P. 116. And also that the contract for the average price of a negro slave in addition to the wages was void, not being included in the articles according to the 2 Geo. 2. c. 36.

Where, in an action of *assumpsit* for clothes supplied to the daughter of the defendant's wife, the defendant pleaded his discharge under an insolvent debtor's act, and described himself in his petition as a druggist, City-road, and it appeared in evidence that he had exercised that business in Paternoster-row, and that he lived on a terrace adjoining to, and leading into, the City-road; held that this was no variance, although it was objected that the misdescription was likely to mislead, and that it had been done with a fraudulent motive; *Pascall v. Brown*, 3 Stark. 54. So, in an action for disturbance of plaintiff's right of common, the declaration stated that he was possessed of a messuage and land with the appurtenants, and by reason thereof ought to have common of pasture, &c.; held, that this allegation was divisible, and that proof that plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*; *Rickets v. Salwey*, 2 B. and A. 360. Where, in an action to try a right of way, it was stated to be from a certain highway leading from the parish of L. to B., and the highway proved to be at that part within the parish; held that it was no variance; *Phillips v. Davies*, 2 Anst. 572.

Proof that the defendant's boat run down the plaintiff's in the Half-way Reach, in the Thames, will support an allegation that the boat was run down in the Thames, near the Half-way Reach, in an action on the case for negligence; *Drewry v. Twiss*, 4 T. R. 558. In an action on the case for running foul of posts fixed in the river, supporting the plaintiff's wharf, it is not necessary to prove the posts or wharf to be at the place at which they are under a *videlicet* alleged to be situate; *Haymer v. Raymond*, 5 Taunt. 789; S. C. 1 Marsh. 363. An action on the case for setting up a certain mark in front of the plaintiff's dwelling-house, in order to defame him as the keeper of a bawdy-house, is not local in its nature; and if the declaration, after describing the house as situate in a certain street called A. Street, in the parish of O. A. (there being no such parish), afterwards state the nuisance to be erected and placed in the parish aforesaid, it will be ascribed to *revenue*, and not to local description, and therefore the place is not material to be proved as laid; *Jefferies v. Duncombe*, 11 East. 226. Where a declaration on an agreement alleged Barnet Common to be in Middlesex instead of in Hertford, it was held to be surplusage, because it was immaterial in such an action whether it lay in Middlesex or Hertford; *Frith v. Gray*, 4 T. R. 561; *Wilson v. Clark*, 1 Esp. 273; *Wilson v. Van Mildert*, 2 B. and P. 394. So, where it alleged that the defendant was overseer of the township of S., and it was proved that he had acted as such, and there was no evidence of overseers having been appointed for the parish of S.; held that, although the appointment was produced, and purported to be an appointment of the defendant as overseer of the parish of S., this was no variance; *Steel v. Smith*, 1 B. & A. 94.

\* It is in general sufficient to describe a contract according to its legal effect. An agreement to sell oats at so much per bushel must be taken to mean the Winchester bushel, and will not be supported by evidence to sell by some other bushel; *Hockins v. Cooke*, 4 T. R. 314. So, if a bill of exchange is stated to have been drawn for a certain sum of money, it will be in-

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(b) In particular.

1st. As to form of action.

1. *Ex contractu*. See *post*, div. 2d. As to the particular cause of action.
2. *Ex delicto*. See *tit.* Assault and Battery; Case; Trespass; Trover.

1. *BLOXAM v. HOWARD*. E. T. 1806. K. B. 5 East, 420. *DOCKWRAV v. DICKENSON*. 1695. K. B. Skin. 640.

In actions of tort the non-joinder of a plaintiff is only a ground for a plea in abatement.\* Per Lord Ellenborough. It is now too well settled to be any longer disputed in a court of law, that the defendant can only avail himself of an objection of this sort; viz. that all the several part-owners in a chattel have not joined in an action of trespass, or of tort brought in respect to it by plea in abatement. I will only refer to *Addison v. Overend*, 6 T. R. 766, in which most of the cases on the subject are collected: *Sedgworth v. Overend*, 7 T. R. 279.

2. *Flower v. Pedley*. 1793. N. P. 2 Esp. 491.

This was an action on the case for slanderous words spoken of the defendant, being a trader. Plea of not guilty. There were two counts only in the declaration. The words laid in the first count were: "I thought Flower would be off when he saw me; he don't like to see my face. I know how he is going on: he is selling coals at a shilling a bushel to pocket the money, and

tended to be English money; *Hearney v. King*, 2 B. & A. 301; *Sprole v. Legge*, 1 B. & C. 16. The statement of a contract for the purchase of a certain quantity, to wit, eight tons of goods, is supported by proof of a contract for the purchase of about eight tons, the precise quantity having been ascertained to be eight tons; *Gladstone v. Neale*, 13 East, 418. The statement of a contract to deliver stock on the 27th of February is proved by evidence of a contract to deliver on the settling day, coupled with proof that the settling day was fixed for, and understood by the parties to mean, the 27th of February; *Wickes v. Gordon*, 2 B. & A. 335. An averment that a bill was drawn by certain persons using the style of "*Ellis, Needham, and Co.*" is supported by proof that the bill was drawn by A. only under the firm of *Ellis, Needham, and Co.*; *Bass v. Clive*, 4 M. & S. 13. So, a general averment that a bill was accepted by the defendants is proved by evidence that it was accepted by their authorised agent for them; *Hays v. Heseltine*, 2 Campb. 604. A declaration on a joint bond is supported by proof of a joint and several bond; *Middleton v. Sandford*, 4 Campb. 34. In an action on a promissory note by A. B., if the plaintiff allege that the note was made payable to him by the name of A. C., and the note appears to have been made payable to A. C., the plaintiff is entitled to recover if it be shown that he was the person really meant, for that is the legal effect; *Willis v. Barrett*, 2 Stark. 29. Where two lots are sold under an enclosure act, a declaration upon a sale of "divers, to wit, two lots," &c. is bad, the agreements being separate both in law and fact, and not forming one contract; *Jones v. Shore*, 1 Stark. 428; and see *Emerson x. Heelis*, 2 Taunt. 47.

\* And the omission of a person who might have been joined as defendant cannot in any manner be taken advantage of; 1 Saund. 291; unless in case of one tenant in common of land, sued in respect of the in land, which case he may plead the non-joinder of his co-tenant in abatement; 1 Saund. 291; see also *ante*, *tit.* Parties to Action, and particular heads according to the subject matter.

† Whenever a party seeks to recover for a breach of duty arising from an employment, such employment must be stated truly in the declaration, and proved as laid whether the action be framed in assumpsit or tort; therefore where the count in a declaration *ex delicto* stated that the plaintiff as owner of a ship, had retained and employed the defendant as his agent to cause her to proceed to Gottenburgh, in order that she might afterwards proceed to St. Petersburg, and that the defendant accepted the retainer; and it was proved on the trial, that a written arrangement had been entered into between the plaintiff's clerk or agent and the defendant, that the ship should touch at Gottenburgh to know the state of things in Russia and receive instruction; held, that this was a fatal variance, as the defendant had not undertaken to proceed to St. Petersburg absolutely and at all events; *Lopes v. De Tastet*, 4 Moore, 266; S. C. 1 B. & B. 538. Where the plaintiffs declare against the defendants on their common law liability as carriers for the loss of a parcel, stating that they for certain hire and reward, undertook to carry goods from London and deliver them safely at Dover, and it appeared that the course of dealing between

become a bankrupt to cheat his creditors." In the second count the words [ 265 ] were laid only; "He is selling coals at a shilling a bushel to pocket the money; to become bankrupt to cheat his creditors." The plaintiff proved the

parties was for the plaintiffs to pay the defendants an annual sum for the carriage of parcels between London and Dover, and on the receipt of such parcel the defendants were in the habit of delivering to the plaintiffs a written acknowledgment stating, that they undertook to deliver the same as directed, "fire and robbery excepted;" and the jury found that this contract had been established between the parties though the loss was occasioned by negligence only; held, a fatal variance; *Latham v. Rutbey*, 3 D. & R. 211; S. C. 2 B. & C. 20; 1 R. & M. 13. A declaration, stating that the defendant, on the sale of Tenerife barilla, asserted that seven-and-a-half cwt. would produce a ton of soap, well knowing it would not do so, is not supported by evidence that he said he had made seven tons of soap out of fifty-one cwt. without giving proof of the scienter; *Horncastle v. Moat*, 1 C. & P. 166. In an action against an attorney for suffering a debtor in custody at the suit of the plaintiff to be superseded, proof that such debtor was a married woman destroys the action when the declaration states that she was indebted; *Lee v. Ayrton, Peake*, 119. But a count in a declaration in an action on the case for diverting and turning a stream of water is not supported by proof of sending it back and checking its course, whereby the water was made to overflow the plaintiff's meadow; *Griffiths v. Mason*, 6 Price, 1. Where in an action on the case for diverting a stream of water from the plaintiff's mill, the declaration alleged that the defendant placed and raised a certain dam across the stream, and thereby diverted and turned the water, and prevented it from running along its usual course to the plaintiff's mill and from supplying the same with water for the necessary working thereof as the same of right ought and otherwise would have done; held, that such allegation was supported by proof that, in consequence of the dam the water was prevented from being regularly supplied to the plaintiff's mill, although the stream was not diverted, as the dam was erected above the mill, and the water returned to its regular course long before it reached the mill and there was no waste of water occasioned by the erection of the dam; *Shears v. Wood*, 7 Moore, 345. In an action for disturbance of plaintiff's right of common, the declaration stated that he was possessed of a messuage and land, with the appurtenances, and by reason thereof ought to have common of pasture, &c.; held that this allegation was divisible, and that proof that plaintiff was possessed of land only, and was entitled to right of common in respect of it, was sufficient to entitle him to right of commons *pro tanto*; *Ricketts v. Salway*, 2 B. & A. 360. In an action for a nuisance to a dwelling house, the declaration stated that at the time of committing the grievance the plaintiff was seised in fee of a dwelling house, and that it was then in the possession and occupation of a certain tenant, or certain tenants thereof, under plaintiff; it appeared that the plaintiff was seised in fee for the inhabitants of a particular parish, and that the house was occupied by the parish paupers, and a person appointed by the parish officers to take charge of them; held that neither the poor nor the master of the workhouse could be considered as tenants to the plaintiff, and that this was a fatal variance between the declaration and the evidence; *Martin v. Goble*; 1 Chmpb. 320. In an action for a false and deceitful representation of the annual returns of a business sold to the plaintiff, an averment that the defendant represented the returns to amount to a sum certain is material, and must be precisely proved, notwithstanding it be laid under a videlicet, and a variance between the allegation and proof is a good ground of non-suit after verdict; *Gilbert v. Stanislaus*, 3 Price, 54. In an action on the case for negligently pulling down a party wall adjoining a wall of the plaintiff's cellar, whereby the roof of the latter fell in, and a quantity of wine was destroyed, and it appeared that the proximate cause of the damage was by placing a quantity of bricks on the roof of the cellar; held, that this was no variance, and need not be set out in the declaration in order to support the action; *King v. Williamson*, 1 D. & R. N. P. C. 35. If plaintiff declares against the sheriff for a false return of nulla bona to a fieri facias against the goods of R. & J. S., and allege that "although R. and J. S. had goods, &c. within his bailiwick, &c., yet defendant, &c.," this allegation is sustained, though plaintiff do not prove that R. S. had any goods, for it is severable that both or either of them had goods, &c.; *Jones v. Clayton*, 4 M. & S. 349. In an action against the sheriff for taking goods without levying a year's rent; if the declaration set forth the particulars of the demise, though unnecessary, and the plaintiff do not prove them as set forth, he must be nonsuited; *Bristow v. Wright*, 1 T. R. 235. Where, in a declaration of trover, a deed was described as "a certain deed of assignment bearing date, &c., purporting to be made between J. S. of the one part and W. R. of the other part, and purporting to be a conveyance from J. S. to W. R. of certain tenements therein mentioned from J. S. to W. R. for the remainder of the term therein mentioned, and yet unexpired," and on its production it appeared to be a conveyance of the premises by lease and release between the same parties, and of the same date; held to be no variance; *Harrison v. Vallance*, 7 Moore, 304; S. C. 1 Bing. 45. In trover for a seaman's prize money order, under stat. 49 Geo. 3. c. 123. which was alleged to have been duly made; held a fatal variance where it appeared to have been signed in blank; *Neck v. Dongan*, 2 Stark. 246. But a declaration in an action for a malicious prosecution, which

[ 266 ] speaking of the words as laid, with the exception of those "to become a bankrupt," and then closed his case. Eyre, C. J. The whole of the words, as laid in either of the counts of the declaration, have not been proved. If, however, any one count does contain a number of substantive slanderous charges, proof of any of them, I apprehend, has been held sufficient, and I am disposed to be of that opinion. But in the present case the whole forms one charge: "He is selling coals at a shilling a bushel to pocket the money and become a bankrupt to cheat his creditors." The mode by which he was to cheat his creditors was by becoming a bankrupt. The whole, therefore, constitutes one general charge, not two distinct ones, of becoming a bankrupt and of fraud in intending to cheat his creditors. This allegation, therefore, ought to have been made out in evidence; and not being so, I am of opinion that the plaintiff must be called.

[ 267 ] 3. RICKETTS v. TULWEY. H. T. 1819. K. B. 2 B. & A. 360; S. C. 1 Chit. Rep. 104.

As in action for disturbing a right of common which plaintiff has in respect of a messuage and land, he may prove a right of common only as to land.

In an action for disturbance of common, where the allegation was of a possession of a messuage and lands (without the connecting words "thereto belonging"), and a right of common claimed in respect thereof; held, that the allegation was devisable; and although the plaintiff failed in proving a right in respect of any messuage at all, yet that, having proved an injury done to the right claimed in respect of land, he was entitled to a verdict. The defendant, however, was entitled to have the verdict entered specially, according to the evidence, that the objection, if valid, might be taken advantage of upon the record.

alleges that the defendant charged the plaintiff with felony, is supported by evidence that the defendant stated to the magistrate that he had been robbed of specific articles, and he suspected and believed, and had good reason to suspect and believe, that the plaintiff had stolen them; *Davis v. Noake*, 6. M. and S. 29; S. C. 1 Stark. 317. Therefore, where a plaintiff declared in case for a malicious prosecution that defendant maliciously, &c. charged him with having feloniously stolen certain articles, his property; and it was proved that the defendant laid an information before a magistrate in which he deposed that the said articles had been feloniously stolen, and that he suspected and believed, and had good reason to suspect and believe that they had been stolen by the plaintiff; held that the evidence supported the declaration, *dissentiente Bayley*. In an action for maliciously suing out a commission of bankruptcy against A. and B. as survivors of Edmond D., when in the *supersedeas* the name was Edward D., the variance was held fatal; *Matthew v. Dickinson*, 1 Moore, 104; S. C. 7 Taunt. 399. The declaration averred that the defendant charged the plaintiff with violently assaulting him, and procured a warrant to apprehend him for the said offence. The charge made was for assaulting and striking; the warrant produced recited the charge to be for assaulting and beating; held that this was no material variance; *Byne v. Moore*, 5 Taunt. 187; S. C. 1 Marsh. 12. In an action for a malicious prosecution, in which the plaintiff charges the defendant with having accused him of the crime of felony, by reason of which he was imprisoned; and on the production of the information before the justice, there is no charge of felony, though the warrant avers to arrest the plaintiff for felony, the evidence does not support the declaration, and the plaintiff shall be non suited; *Leigh v. Webb*, 2 Esp. 165. And it seems that no action lies against the complainant before the justice of the peace. Where the declaration stated that the defendant struck the plaintiff's cow divers blows, whereof she died, and it was proved that the defendant had beaten the cow unmercifully, and that the plaintiff, to shorten her miseries put her to death; held to be no variance after verdict; *Hancock v. Southal*, 4 D. & R. 202. An averment in the declaration that defendant's dogs were accustomed to worry and bite sheep and lambs is not supported by proof that the dogs were of a ferocious and mischievous disposition, and that they had frequently attacked men. *Semble* however, that an averment, that the dogs were of a ferocious and mischievous disposition would be sufficient in an action brought for an injury to plaintiff's sheep, without alleging specifically that they were accustomed to bite and worry sheep; *Hartley v. Harriman*, 1 B. & A. 620. Where plaintiff marked his goods "Sykes' patent," to show that they were his own manufacture, and the defendant copied the mark on his goods, to show that they were plaintiff's manufacture, and sold the goods so marked as and for the plaintiff's manufacture, and the declaration alleged that the defendant sold the goods as and for goods manufactured by the plaintiff; the evidence was that the persons to whom the defendant sold them knew that they were not manufactured by the plaintiff, but that the defendant copied plaintiff's mark, and sold the goods so marked, in order that the purchasers might re-sell them as and for goods manufactured by plaintiff, and which they did; held not a fatal variance; *Sykes v. Sykes*, 5 D. & R. 292; S. C. 3 B. & C. 541.

4. GORDER v. WHEATLY. 1810. N. P. 1 Campb. 231.

Per Lord Ellenborough, C. J. If matter of description be not proved as laid, it is a fatal variance.

5. TEMPEST v. CHAMBERS. 1816. N. P. 1 Stark. 67.

Per Abbott, C. J. No action can be sustained, unless the facts and circumstances averred be proved, so as to constitute a cause of action as laid.

6. MARE v. WILSON. E. T. 1786. K. B. 1 T. R. 659.

In an action by the consignor of goods against the carrier, on a promise to carry them for a certain sum and reward, to be paid by the plaintiffs, proof of an agreement between the consignor and consignee that the latter shall pay the carriage is no variance, the consignor being in law liable to the defendant.

But matter of description must be proved as laid.\* And the facts averred must be proved so as to constitute a cause of action as laid.† [ 268 ] In tort, stating matter in legal effect suffices.‡

2nd. *In process.*§

3rd. *Between pleadings and process.*||

\* And where a tort matter of contract is laid, it must be proved as stated; *Bristen v. Wright*, Dougl. 640.

† So, evidence of the improper stowing of the defendant's anchor, whereby it broke into another vessel, and damaged the plaintiff's goods, will not support a count, stating the injury to have been caused by the unskilful steering of the defendant's ship; *Hullman v. Bennett*, 5 Esp. 226. So, where the declaration stated that the defendant wrongfully placed and continued a heap of earth, whereby the refuse water was prevented from flowing away from his house down a ditch at the back thereof; and it appeared in evidence that the heap was not originally placed so as to obstruct the water, but that in process of time earth from the heap was trodden down, and fell into the ditch, and obstructed it; the variance was held fatal, for the injury was not the immediate act of the defendant's, but consequential; *Fitzsimmons v. Ingles*, 5 Taunt. 534.

‡ As in an action for damage occasioned by the defendant's negligence in driving his carriage, it is sufficient to show that the damage was occasioned by the negligence of his servant; *Brucker v. Fromont*, 6 T. R. 659.

§ A variance between the affidavit and writ in letters of the defendant's name, as "Ren-moll" for "Rennolls," does not vitiate the affidavit; — *v. Rennolls*, 1 Chit. 659. So, mis-spelling in a final syllable of the defendant's name, as by putting "rum," instead of "run," is immaterial in an affidavit to hold bail; *Anon.* 1 Chit. 660. A variance in the body of the copy of process from the writ itself is fatal, and the process and all subsequent proceedings may be set aside; *Morris v. Herbert*, 1 Price, 245.

Where, in a copy of a writ of latitat, the defendant was described by the name of "John Stafford," and in the notice to appear by the name of "John Stratford," held not to be a variance of which the defendant could avail himself on a motion to set aside the service of the process for irregularity; *Wilson v. Stafford*, 2 Chit. 355.

A *capias* ad respondendum is made returnable "before his Majesty's Justices of the Bench, at Westminster," by virtue of which the sheriff issues his mandate to the bailiff of a liberty, commanding him to take the defendant, so that the sheriff may have his body "before his said Majesty at Westminster," and the bailiff takes a bail-bond conditioned for the defendant's appearance "before his said Majesty at Westminster;" held that the variance between the bail bond and the writ was fatal, and, therefore, that the bond was void by stat. 23 Hen. 6. c. 9; *Renolds v. Smith*, 2 Marsh, 258; Where, in an action on a bail bond, the special original was returnable before the king, wheresoever, &c., and the word "ubique" was omitted, held that the omission was not fatal; *Shuttleworth v. Pilkington*, 1 T. R. 240. On a bail-piece the name *Turbart* for *Tabart* is a fatal variance; *Bingham v. Dickie*, 5 Taunt. 814.

|| Where a defendant is described in process generally, he may be declared against as administrator, the object of the writ being merely to bring him into court; *Watson v. Pilling*, 6 Moore, 66. So, on *capias* absolute, a declaration *qui tam* is not a variance; *Lloyd, qui tam, v. Williams*, 2 W. Blac. 722.

In an action of debt on simple contract the declaration is good, though it specify by the several counts a less sum than appears to be demanded by the recital of the writ, and yet assigns as a breach of non-payment of the sum demanded in the writ; *M'Quillan v. Cox*, 1 H. Blac. 249. And in such an action the plaintiff may prove and recover a less sum than is stated to be due. A declaration in the *debet* and *detinet*, where the original was in the *detinet* only, was held not fatal; *Anon.* Loft, 396. The Court of King's Bench will not set aside the proceeding for irregularity between the original writ and declaration; *Spalding v. Mure*, 6 T. R. 363. Where the process is not bailable, the writ may be joint and the declaration several; *Loveridge v. Bo-*

[ 269 ] *tham*, 1 B. & P. 49; *S. P. Lewin v. Smith*, 4 East, 589; but see rule of Court, K. B. T. T. 8 Geo. 4. But it cannot be so where the process is bailable. If process be served in the name of one plaintiff, and declaration delivered in the name of two, it is bad; *Rogers v. Jenkins*, 1 B. & P. 383. A *quare clausum fregit* against two, and declaration against one, was, by the Court of Common Pleas, held regular; *Spencer v. Scott*, 1 B. & P. 19. Where five defendants were in an affidavit to hold to bail, and separate bailable process was issued against one, in which the other four were not named, and serviceable process was issued against the other four, who were not mentioned in the bailable process, and the bail-piece named the defendant alone against whom the bailable process had issued, and the declaration was filed against all five, that Court refused to grant an *exoneratur* on the bail-piece, although it was insisted that there was a variance between the process and declaration; *Christie v. Walker*, 7 Moore, 362; S. C. 1 Bing. 68. The Court refused to set aside the proceedings for a variance between the writ and declaration, where two writs had been issued, the one bailable in *assumpsit*, and the other not bailable, but requiring the defendant to answer in a plea of trespass and assault, and one declaration was delivered in *assumpsit*, and the other in trover; *Campbell v. Palmer*, 2 Chit. 166; and see *Large v. Attwood*, 1 D. & R. 551.

But the declaration in an action for maliciously causing a writ to be sued out, whereon the plaintiff was imprisoned, stating the process with the *ac etiam* clause as sued out 50*l.* (instead of 30*l.*, according to the fact), and an indorsement of 15*l.*, the warrant being for 30*l.*, is a fatal variance; *Gadd v. Bennet*, 5 Price 540. A variance between the writ and count (the *ac etiam* being in case on promises, but the declaration in debt) is not a ground for entering an *exoneratur* on the bail-piece, where the sum sworn to is under 40*l.*; *Lockwood v. Hill*, 1 H. Black. 310. The Court will not on motion permit a defendant to take advantage of a variance between a sum mentioned in the *ac etiam* part of the *latital* and the declaration; *Irving v. Joues*, 5 T. R. 402; and see *Douglas v. Irlam*, 4 T. R. 416. If the writ be that the defendant answer in "a certain plea of trespass on the case on promises," and the declaration be in debt for goods sold and delivered, and money borrowed, the Court of C. P. will discharge the defendant on entering a common appearance; *Kerr v. Sheriff*, 2 B. & P. 358. A bailable writ is not necessarily a special writ within the 51 Geo. 3. c. 124; and therefore a plea stating that plaintiff commenced his action by a bailable writ indorsed for bail for 60*l.*, by virtue of which defendant was arrested, and that plaintiff's then cause of action did not amount to 15*l.*, or to any sum for which defendant was liable to be arrested, was held bad on general demurrer for not showing the writ to be a special writ; *Ball v. Swan*, 1 B. & A. 393. Where, in a declaration against the sheriff for having made a false return to a *fierifacias*, it was alleged that from the day of the delivery of the writ, until, and at, and after the return thereof, the defendant was sheriff of Kent, and the writ appeared to be returnable on the 12th February, being the last day of Hilary Term, and the defendant's shrievalty expired on the 7th of that month; held, that this was no variance, as it was immaterial to allege in the declaration that the defendant was sheriff at the return of the writ; *Jervis v. Sidney*, Bart. 3 D. & R. 483. A variance between the name of the attorney in the warrant and in the declaration may be amended by altering the name in the warrant to that in the declaration, in a penal action after error brought, and the variance assigned for; *Richards, qui tam, v. Brown*, 1 Dougl. 114.

Where, in an affidavit to hold to bail on a bill of exchange for 523*l.* 17*s* 6*d.*, the plaintiff declared on a bill for 523 livres 17 sous and 6 deniers sterling; held, that there was no variance so as to entitle the defendant to be discharged on filing common bail, the meaning of the two expressions being the same; *Gould v. Logette*, 1 Chit. 659. And where an affidavit to hold to bail stated that I. S. was indebted to the deponent in the sum of 44*l.* 1*s.*, being the amount of a certain inland bill of exchange, drawn by the said I. S. on the d

4th. *Between pleadings and evidence.*

[ 270 ]

1. *Connected with bills and notes.\**

ponent, and by him accepted for the honour of the said I. S., payable to the order of the said I. S. at a day now past, and which said bill of exchange was paid by the deponent; held that, although the declaration contained only the money counts for the amount of the bill, it was no variance from such affidavit; *Brooks v. Clark*, 2 D. & R. 148. But where the plaintiffs issued a writ against a defendant in their own names, and declared in their own right, and described themselves in the affidavit to hold to bail as surviving partners, it is a fatal variance, and the Court of Common Pleas ordered the bail-bond to be cancelled, and would not allow the plaintiffs to amend their writ and declaration on payment of costs; *Attwood v. Rattenbury*, 5 Moore, 209.

\* Where the declaration alleged that the defendant on, &c. made his certain bill of exchange in writing bearing date the same day and year aforesaid, and the real date of the bill was different, it was held that the variance was fatal; *Anon.* 2 Camp. 303. But if a bill be declared on as made on a particular day, it is no variance if it bear date on a different day; *Coeon v. Lyon*, 2 Camp. 307. And declaration on a promissory note in general terms, stating the promise by the defendant to pay the money sought to be recovered, is sufficient to sustain the action, though the note when produced shows it was given to pay the debt and costs of an action against a third person; *Coombs v. Ingram*, 4 D. & R. 211. But if a promissory note is made payable at a particular place, it is a fatal variance to omit to state this in declaring on the note; *Roche v. Campbell*, 3 Campb. 247. The maker of a promissory note payable at a specified time after sight, at the time of making it writes in the margin, "accepted by myself;" these words constitute no part of the original instrument, and need not be noticed in the declaration; *Splitterber v. Kohn*, 1 Stark. 125. The maker of a promissory note by a note at the foot makes it payable at a particular place; and allegation (after stating the promise to pay in the usual manner) that the defendant then and there made the note payable at the particular place, does not amount to a misdescription of the note; *Hardy v. Woodroffe*, 2 Stark. 319. So, an allegation in a declaration that a bill of exchange was presented for payment by I. S., does not render it incumbent on the plaintiff to show that a presentment by I. S. was made. The material allegation is the presentment, and by whom it is made is immaterial; *Boehm v. Campbell*, 1 Gow. 55. But where the indorsee declared against the maker of a promissory note, that he made the same payable at the house of Messrs. B. and Co. London; and, upon production of the note at the trial, it appeared that the address of the house of Messrs. B. and Co. was not a part of the note, but only a memorandum at the foot of the note; held, that this was a variance; *Exon v. Russell*, 4 M. & S. 505.

In another case it was said, if, by a memorandum at the foot of a promissory note, it is made payable at a particular place, it is to be considered as part of the contract, and it is not a variance to allege the note to be so payable; *Sproule v. Legge*, 3 Stark. 156. Where a declaration upon a promissory note made in Ireland alleged that it was made payable at No. 81, Dame-street, Dublin, for sterling money, without averring that Dublin was in Ireland, and that the money for which the note was given was Irish currency; held to be insufficient, as the note must have been drawn in England, and for English money, and was not supported by proof that it was made at Dublin, in Ireland, and for Irish money; *Sproule v. Legge*, 2 D. & R. 15; S. C. 1 B. & C. 16. The declaration stated, that a bill of exchange was drawn and accepted at Dublin, to wit, at Westminster, for a certain sum therein mentioned, without alleging it to be at Dublin, in Ireland; held that the bill upon this declaration must be taken to have been drawn in England for English money; and therefore proof of a bill drawn at Dublin, in Ireland, for the same sum in Irish money, which differs in value from English money, did not support the declaration, and this was a fatal variance; held, also, the bill having been drawn for a

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## 2. Connected with bonds.\*

certain sum sterling, that the omission of the word "sterling" in the declaration was immaterial; *Kearney v. King*, 2 B. & A. 301; S. C. 1 Chit. Rep. 28. A foreign bill is accepted for the payment of 100*l.* sterling, the omission of the word "sterling" is not a material variance; *Glossop v. Jacob*, 1 Stark. 69. In an action by the indorsee of a bill of exchange, if the declaration states the indorsement to have been made before the bill became due, and it appears in evidence to have been made after the bill was due, this is not a material variance; *Young v. Wright*, 1 Campb. 139. An averment in the declaration that A. B. and Co. accepted a bill of exchange according to the usage and custom of merchants is supported by evidence that the bill was accepted by C. D., their authorized agent, thus, "For A. B. and Co., C. D.," *Steyn v. Heseltine*, 2 Campb. 604. *semble*, that this is no variance, and at any rate the defendant is not at liberty to object that the indorsement is not in the hand-writing of the payee himself, after a promise, with a knowledge of this circumstance, to pay the bill; *Helmsley v. Loader*, 2 Campb. 450. So, if a bill is indorsed by procuration, it should be stated in the declaration; for if the declaration state that the party indorsed it, his own proper hand being thereunto subscribed, and it appears to have been done by the procuration from such party, it is a fatal variance; *Levy v. Wilson*, 5 Esp. 180. And in a declaration on a joint and several note, payable by instalments, the day on which one of the instalments becomes payable be misstated, it is a fatal variance; *Wells v. Girling*, 3 Moore, 79.

A plaintiff suing upon a promissory note, which purports to be payable to a person of a different name, may show by evidence that he was the person intended; *Willis v. Barret*, 2 Stark. 27. But if a bill drawn by John Couch be declared upon as drawn by John Crouch, the variance is fatal; *Whitwell v. Bennet*, 3 B. & P. 559. The declaration in an action by the indorsee of a bill of exchange against the acceptor, alleged that it was directed to the defendant, this allegation is not supported by proof that the drawer drew the bill, payable to his own order at a specified place, although the defendant, when it was presented there, wrote his name upon it as the acceptor; *Gray v. Milner*, 2 Stark. 336. A bill of exchange drawn by J. S. to his own order for value received, means value received by the drawee, and if it be alleged in the declaration to be for value received by the said J. S., it is a variance; *Higmore v. Primrose*, 5 M. & S. 65; S. C. 2 Chit. Rep. 333. Declaration by the payee against the maker of a promissory note, payable to the order of the payee for "value received" generally, is not disproved by evidence of a note payable to the plaintiff's order for "value received in Mrs. L.'s estate;" *Bond v. Stodale*, 7 D. & R. 140. Under a count for a usury, in discounting two bills in the possession of B., one of which is described as drawn by B. on a certain person, to wit, John H., it is a fatal variance if the bill produced appears to be drawn on Abraham H.; *Hutchinson v. Piper*, 4 Taunt. 810. A bill of exchange in this form, "Pay to J. G. B., or order, 315*l.* value received," and subscribed by the drawee, may be alleged in pleading to be a bill of exchange for value received by the drawer; *Grant v. Da Costa*, 3 M. & S. 351. Plaintiff declared against the defendant as acceptor of a bill of exchange, payable to certain persons using the firm of Messrs. M'Brair, Watson, and Co. Defendant pleaded that the said Messrs. M'Brair, Watson, and Co. had accepted satisfaction; plaintiff replied that the said persons as aforesaid, using the firm of Messrs. M'Brair and Co. (leaving out the name of Watson), did not accept satisfaction, and concluded to the country; *semb.* that this variance could only be taken advantage of on a special demurrer; *Bell v. Da Costa*, 2 B. & P. 446. Where, in action against the drawer of a bill of exchange, who had pleaded *non assumpsit*, it appeared that

\* If the plaintiff show, on his declaration in debt on bond against two, that the bond is executed by three, it is good matter of plea in abatement or in



## 3. Connected with carriers.

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it was drawn by him and another jointly, held to be no variance; *Evans v. Lewis*, and *Germain v. Frederick*, 1 Phil. Evid. 199. Declaration stated bill of exchange to be drawn upon and accepted by three persons; it was proved to be drawn upon and accepted by the three jointly with a fourth: held that this was no variance; *Mountstephen v. Brooke*, 1 B. & A. 224. In an action against three on a promissory note, two of whom are stated to be outlawed, the third may take the advantage of the misnomer of his companions upon the general issue, on the ground of a variance between the contract declared upon and that proved; *Gordon v. Austin*, 4 T. R. 611. A bill of exchange drawn in this form, "Pay to our order," signed in the name of two persons and Co., and accepted by defendant, may be declared upon by the indorsees as a bill drawn by an aggregate firm; and if it be proved that the firm consists of only one person, yet it is not a variance; *Bass v. Clive*, 4 M. & S. 13; S. C. 4 Campb. 78.

arrest of judgment, but is no ground of nonsuit on the plea of *non est factum*; *South v. Tanner*, 2 Taunt. 254. If in an action on a bond against one, it be declared on as the joint bond of him and two others, it is no variance that the bond is likewise the separate bond of each of the obligors; *Middleton v. Sandford*, 4 Campb. 34. And if the defendant pleads that it is not his deed at the trial, it is only necessary to prove that the bond was executed by the defendant. Where there are several names composing a firm, but part are nominal only, and not interested in the profits; and, in a declaration on a bond of indemnity to secure money advanced to a third person, the breach states the money to be paid by the partners only who are interested in the profits, it is good, though the money was paid on bills drawn on the firm composed of all the partners; *Harrison v. Fitzhenry*, 3 Esp. 238. To an action of debt on bond, the defendant prayed *oyer* of the condition, which was for the payment of 100*l.* by instalments, till the said sum of 100*l.* be paid, and then pleaded *non est factum*, the word "100*l.*" had been omitted in the second place where it occurs in the condition, and was afterwards inserted without the defendant's knowledge. Held that, although this alteration did not avoid the instrument, yet it made such a variance between the *oyer* and the condition as precluded the plaintiff from recovering; *Waugh v. Russell*, 1 Marsh. 214; S. C. 5 Taunt. 707. Growing crops may be considered in the nature of goods and chattels, under the stat. 11 Geo. 2. c. 19. as they may be distrained in the same manner as articles of the latter description; where, therefore, the condition of a replevin bond was that the defendant should prosecute his action with effect against the plaintiff for taking and detaining his goods, chattels, and growing crops, and in the declaration the bond was set out as conditioned to prosecute with effect for taking and detaining the goods and chattels in the said condition mentioned; held that this was no variance; *Clover v. Coles*, 7 Moore. 231; S. C. 1 Bing. 6.

A declaration on a bail-bond, in setting out the condition, stated that, if the defendant should appear to answer the plaintiff according to the custom of his Majesty's Court of Common Bench here, the obligation should be void; on the production of the bond; the former words were omitted; held that this was no variance, as it was only necessary to set out the condition according to its legal effect; *Bonfellow v. Stewart*, 3 Moore. 214. Where the condition was alleged to be, "to appear before his Majesty's justices at Lancaster, on," &c.; but, on reference to the bond, it appeared to be, "to appear before us on," &c.; held that this was no variance, as the allegation was according to the legal effect of the condition; *Shaw v. Lee*, 3 Stark. 76. Where, in an action on a bail-bond, the condition set out on the record was "to answer the

\* In an action of *assumpsit* against a carrier for the loss of goods, where a contract is alleged to carry them from A. to B., a variance in evidence as to  
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4. Connected with contracts.

(a) Generally.\*

plaintiff in a plea of trespass, and also to a plea of the plaintiff to be exhibited against the defendant for 60*l.*, upon promises," and on the production of the bond it did not contain the words "upon promises;" held that this was a fatal variance; *Baker v. Newbegin*, 1 R. & M. 93. Six partners entered into two bonds of submission to arbitration; in the one, three gave a joint and several bond to the other three, conditioned for the due performance of the award, and the three latter gave a similar bond to three former: in the recital of the bond, the differences were stated to be depending between the above bounden three and the above-named three; and in setting out the bond in the declaration, the differences were laid to be depending between the six partners collectively; held that this was no variance; *Winter v. White*, 3 Moore, 674. An action may be maintained upon a bond, expressed to be payable to a mercantile firm by the persons who actually constituted the firm when the bond was executed; *Moller v. Lambert*, 2 Campb. 548. Declaration by B. a treasurer of a friendly society, on a bond to A., then being treasurer. *Plea non est factum*. The bond given in evidence was to A., without stating him to be treasurer to the society; held that B. was entitled to recover; *Cartridge v. Griffith*, 1 B. & A. 57.

the *termini* is fatal; *Tucker v. Crackbin*, 2 Stark. 385. But where a count in a declaration against a carrier by water alleged that, in consideration that the plaintiff, at the request of the defendant, had caused to be shipped on board the defendant's vessel a quantity of wheat to be carried to a certain place for freight; to be thereafter paid to the defendant, he undertook to carry the wheat safely and deliver it on a given day; but it appeared that the defendant's undertaking to carry was made before the whole of the wheat had been shipped on board his vessel: held, that the count might be supported, although it was objected that the consideration for the promise was executory; *Streeter v. Harlock*, 7. Moore, 283; S. C. 1 Bing. 34. In an action by the consignor of goods against a carrier for non-delivery, where the plaintiff averred that the defendant undertook to deliver, &c., in consideration of the hire to be paid by the plaintiff: proof that the hire was to be paid by the consignee was held to be no variance, the consignor being by law liable; *Moore v. Wilson*, 1 T. R. 659. If the declaration state that the defendant, being the owner of a stage coach, undertook to carry "the plaintiff, her children, and servants, together, in and by a certain stage coach," evidence that the whole inside of the coach was taken for the plaintiff and her three daughters, and two outside places for her servants, will support the declaration, and the defendant having sent a double-bodied coach, and refusing to take them unless one of them would travel in one body, and the other in the other body, is a breach of this agreement, the stat. 60 Geo. 3. c. 48. enacting that double-bodied coaches shall only carry eight outside passengers; it is also a breach of the agreement, that there were eight other outside passengers permitted to go by the coach, if the plaintiff's servants refused to go by it on that account; *Long v. Horne*, 1 C. & P. 610.

\* The doctrine of variance between the pleadings and evidence, where the action is on a contract, is stated in *Gwinnett v. Phillips*, 3 T. R. 643. and *King v. Pippet*, 1 T. R. 235; where the plaintiff, having declared upon articles of agreement, calls upon the defendant to produce them, and they do not contain the contract stated in the declaration, he cannot afterwards object to the authority under which they were executed, nor can he be let in to give parol evidence, under a general count, of any contract arising out of these articles; *Scrimshaw v. Grantham Canal Company*, Forrest, 67. *Quære*: If a declaration state the condition to be a certain reasonable reward, evidence that a specific sum was agreed upon will be deemed variance? *Semble*, not; *Bayley v. Tucker*, 2 N. R. 458. It is not necessary that an allegation should be

as extensive as the proof; therefore, where a count in debt on the statute 55 Geo. 3. c. 137. s. 6. stated that the defendant supplied the poor of the parish of W. with provisions, and it was proved that the poor of the parish of W., together with the poor of four other parishes, were jointly maintained in a workhouse: held, 1st. That it was no variance, the proof being larger than the allegation; and, 2d. That the objection as to a variance between the allegation of a supply of the poor of the parish of W. and the proof of a supply of other poor in the workhouse, not having been taken at *Nisi Prius*, could not be afterwards made available; *West v. Andrews*, 1 B. & C. 77; S. C. not S. P. 2. D. & R. 184.

A declaration in *assumpsit* stated that, in consideration that the plaintiff would, at the request of the defendant, lend him a horse, the latter promised to take proper care of him, and return him to the plaintiff in as good a condition as he was in at the time of the promise, or pay fifteen guineas. The contract proved was, in addition to these terms, that the defendant should find the horse meet for his work. Held, that the contract was sufficiently stated in the declaration, and according to its legal effect; *Handford v. Palmer*, 5 Moore, 74; S. C. 2 B. and B. 359. Where an agreement in writing is to be performed on a certain day, and the parties agree to enlarge the time, a declaration on the day stated in the agreement, though the evidence is of a different day, will support the action; *Thresh v. Rake*, 1 Esp. 53. A contract for yearly service, at a specific salary, must be proved as alleged, although both the time and sum are averred under a *videlicet*; *Preston v. Butcher*, 1 Stark. 3. If on an agreement for a wager be endorsed, "N. B. To start P. P. in fifteen days from this date," and no notice be taken of such indorsement in the declaration, and no evidence be given to explain the meaning of the letters P. P., the Court will not, after verdict, hold it to be a variance; *Whaley v. Pajot*, 2 B. and P. 51.

A ship was described in a memorandum for charter as "The Swedish ship or vessel called the Maria." In fact, she was British-built, and had a British register, but she had a complete set of Swedish papers, and a Treasury licence to sail as a Swedish ship, which particulars were known to the freighter; held, that in an action against him for not loading and dispatching the ship according to the memorandum for charter, he could not set up as a defence that she was, in point of fact, a British, and not a Swedish ship; *Reusse v. Meyers*, 3 Campb. 475. In an action on an agreement to employ a ship against the defendant, as master, and it turned out he was not master, but owner: held a fatal variance, and ground of nonsuit; *Rickwood v. Footman*, Abb. Ship. 115. A replication to a plea of infancy, that the promise to pay was made by the defendant after he came of age, is not sustained by proof of a promise to pay after action commenced; *Thornton v. Illingworth*, 4 D. & R. 545. An averment in a declaration on the gaming act, that the party lost to the defendant, by playing at *rouge et noir*; held sufficient on error, without alleging the money to have been lost by playing with him; *Taylor v. Williams*, 3 Bing. 449. In a declaration on the lottery act, if the plaintiff avers the taking of a certain sum for the insurance of a number, proof that that sum was given for the insurance of several numbers, is a fatal variance; *Phillips, q. t. v. Mendez Costa*, 1 Esp. 59. A count stating generally that the defendant had insured a certain number in the state lottery is not a variance, if the witness proves that a premium was paid at the time. If plaintiff declares upon a corrupt contract, on the 21st December, 1774, giving day of payment to 23rd December, 1776, evidence of a contract on the 23rd December, 1774, for two years, is a fatal variance; *Carlisle q. t. v. Trears*, Cowp. 671. A corrupt agreement for the forbearance of money till one or the other of two days at the option of the borrower must be pleaded, according to the fact in the alternative; and if it be stated as an absolute forbearance till one of those days, the evidence will not support the plea; *Tate v. Wellings*, 3 T. R. 531. Where plaintiff declared that defendants accounted with him for all the monies severally due from them, and that the amount of such monies was 21l. 6s.,

and in consideration that he would forbear payment of the monies severally due from them, the gross amount of which was 21l. 6s. defendants undertook to pay the said sum, &c., and the plaintiff proved that the sum due to him was 20l. 18s.; held that this was a fatal variance; *Amfield v. Bate*, 3 M. & S. 173. A declaration on a guarantee stated the consideration of the instrument to be, that the plaintiff would give credit to a third person in manner then and there agreed upon between them; by the correspondence produced in evidence, to support such guarantee, the terms on which the credit was stated to be given, were "to be agreed upon;" held that the substance of the consideration was properly set out in the declaration, and consequently that there was no variance; *Irving v. Mackenzie*, 1 B. and B. 523. In *assumpsit* on a guarantee, the declaration stated that the defendants undertook to indemnify A. for holding goods in his warehouse on their behalf, and delivering the same up to them when requested so to do; on the production of the instrument, it appeared that the defendants only guaranteed him for holding the goods in his warehouse on their behalf; held that this was no variance, as it must be implied that he was to deliver them up to the defendants; *Sampson v. Burton*, 4 Moore, 515; S. C. 2 B. and B. 89. It seems that the words "credit" and "usual credit" are synonymous; where, therefore, a declaration described a guarantee as "credit" generally, and in the guarantee the expression was "usual credit;" held that this was no variance; *Atkinson v. Carter*, 2 Chit. Rep. 403.

\* It is not necessary in an action for non-delivery of goods sold, to set out more of the contract than relates to the breach; *Sequier v. Hunt*, 3 Price, 58. Therefore, proof that it was part of the contract that plaintiff should pay for the goods by bill at two months, on invoice or delivery, is not a fatal variance, from a statement in the counts that they were to be paid for by a bill at two months. A declaration stated that the defendant bargained for and bought of plaintiff a quantity of East India rice, according to the conditions of sale of the East India Company, to be put up at the next Company's sale at a certain price there mentioned. Proof that, besides these conditions, the rice was to be sold "per sample," this is no variance; these latter words not being a description of the commodity sold, but a collateral engagement that the rice should be of a particular quality; *Palmer v. Palmer*, 4 B. & A. 387. If there be a contract for the sale of goods by a particular ship on arrival, this means on the arrival of the goods which the ship is expected to bring, and if the ship arrives empty without any default on the part of the vendor, he is not liable to the purchaser for the non delivery of the goods; *Boyd v. Siffkin*, 2 Campb. 326. If the declaration states an agreement to take in a full cargo, and that proved be to take in a certain quantity, specifying it, though such quantity may be a full cargo, the variance is fatal; *Harrison v. Wilson*, 2 Esp. 708. A contract to deliver from ship or warehouse may be described as a contract to deliver generally, without specifying the places of delivery; *Thornton v. Jones*, 2 Marsh. 287; S. C. 1 Chit. 60. Therefore, where there was a contract for the sale of fifty casks of St. Petersburg tallow, at 72s. per cwt. warranted ready for delivery from ship or warehouse by the 1st of November, to be weighed or taken at the king's landing scale, &c.; held that this was only a general undertaking to deliver, that the words "from ship or warehouse" were immaterial; and therefore that the omission of these words in the declaration was not a fatal variance; *Thornton v. Jones*, 2 Marsh. 287; S. C. 1 Chit. 60. A contract for the purchase of a certain parcel of hemp, the exact amount of which not being known at the time, was described in the contract as about eight tons, may be declared on as a contract for eight tons, the certain quantity which it was afterwards proved to be, which quantity was laid under a *videlicet*; *Gladstone v. Neale*, 13 East, 410. Where the contract declared upon was that the defendant should deliver to the plaintiff all his tallow, at 4s. per stone, and the contract proved was, that the defendant

should deliver it at 4s. per stone, and so much more as the plaintiff paid to any other person, this was held a fatal variance; *Churchill v. Wilkins*, 1 T. R. 447. Where the contract declared upon was, that plaintiff had bargained and sold, and defendant agreed to buy, a large quantity of head matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved was for the purchase of all the head matter and sperm oil *per the Wildman*; held that this was no variance; *Wildman v. Glossop*, 1 B. & A. 9. Where in *assumpsit* the declaration stated that the defendant was indebted to the plaintiff, as assignee of J. S., a bankrupt, for goods sold and delivered to the defendant by the plaintiff as such assignee; and it was proved that the goods had, in fact, been sold by the bankrupt with the concurrence of a former assignee, whose appointment had been vacated by the Lord Chancellor, and the plaintiff was appointed in his stead; held that this was no variance; *Aldritt v. Kithridge*, 8 Moore, 372; S. C. 1 Bing. 355. The plaintiffs declared that they agreed to sell, and the defendants to buy, certain goods and merchandize: to wit, 328 chests, and 30 half chests of oranges and lemons, at and for a certain price; to wit, the price of 623l. 3s. The contract proved was for 308 chests, and 30 half chests of China oranges, and 20 chests of lemons, without specifying price. Held that this was no variance; *Crispin v. Williamson*, 1 Moore, 547; S. C. 8 Taunt. 107. A declaration on a contract for not delivering gum Senegal, is supported by evidence of a contract for rough gum Senegal, if it appear in evidence that all gum Senegal on its arrival in this country is called rough; *Silver v. Heseltine*, 1 Chit. 39. A declaration for not delivering soil or breeze is not supported by proving an agreement to deliver soil only, soil and breeze being different things; *Clark v. Manstone*, 5 Esp. 239; S. C. 1 Chit. 60; and see *Penny v. Porter*, 2 East, 2. A declaration alleging that the defendant undertook to deliver a parcel of goods for the plaintiff is disproved by evidence of a special agreement to deliver them to the bearer of a receipt given for the goods at the time of delivery; *Samuel v. Darch*, 2 Stark. 60. And evidence of an agreement to deliver goods to defendant is a variance from a count, on an agreement to deliver them to another person; *Leary v. Goodson*, 4 T. R. 687. So, in an action of debt *qui tam* for selling coals contrary to law, the contract upon which the penalty arises must be truly stated, and any variance is fatal; therefore, where the contract was stated to be with two persons, and, in fact, it was with those two and another, it was ruled to be a fatal variance, though the declaration stated the exact quantity which the two were to have; *Parish, qui tam, v. Burwood*, 5 Esp. 33; S. P. *Everett, qui tam, v. Tindall*, 5 Esp. 169. Upon a contract to remove goods in a month, it is a fatal variance to declare for not removing within a reasonable time; *Hore v. Milner*, Peake, 42. A contract to furnish goods with a certain latitude as to the price, as saddles at 24s. to 26s. may be described as a contract to furnish them at a reasonable price; *Laing v. Fidgeon*, 6 Taunt. 108. A. agrees to buy, and B. to sell, a quantity of "St. Petersburg clean hemp" at a certain price, through the medium of a broker who acts as agent for both parties; the broker delivers a bought note to A., in which, by mistake, he inserts "Riga Rhine hemp" instead of "St. Petersburg clean hemp," and then delivers a sale note to B. stated correctly according to the original contract; held, that the variance between the two notes was fatal, and, therefore, that B. could not recover in an action against A. for not completing the contract; *Thornton v. Kempster*, 1 Marsh, 355; S. C., not S. P., 5 Taunt. 786.

A contract described as having been made for a certain number of bushels of corn must be considered as a contract for that number of statute bushels; *Hockin v. Cooke*, 4 T. R. 314; S. C. 1 Chit. 28. Proof that the defendant agreed to sell so many bushels of corn according to a particular measure will not support an allegation in a declaration to sell so many bushels, because bushels, without any other explanation, means a bushel by statute measure. In *assumpsit* by one of two surviving partners, the fact of his being the survivor must be stated in the declaration; therefore, a count for goods sold by

him to the defendant is not supported by proof that his goods were sold by him and his deceased partner; *Jell v. Douglas*, 4 B. & A. 374. Where different lots are sold at an auction for different sums, the contracts are separate both at law and fact, and in a special action for refusing to adhere to the conditions of sale, the plaintiff cannot consolidate the two contracts; *James v. Shore*, 1 Stark, 426.

\* Where a declaration in *assumpsit* stated that, in consideration that the plaintiff would procure J. S. to grant a lease to the defendant, the latter promised to pay the plaintiff 170*l.*; and it was proved that J. S. having agreed to grant a lease to the plaintiff, the latter originally undertook to assign it to the defendant for the consideration mentioned; but that afterwards a lease, to which the plaintiff was a party and assented, was granted immediately by J. S. to the defendant, in which the consideration to be paid by the latter to the plaintiff was not mentioned. Held, that the evidence merely amounted to a proof of the substitution of a new contract to procure a lease from J. S. to the defendant in lieu of the original contract, and, consequently, that there was no variance; *Boon v. Mitchell*, 1 B. & C. 18. The first count of a declaration in *assumpsit* stated, that the plaintiffs were possessed of lands for the remainder of three terms of years, which respectively commenced on the 15th of February, 1785; that they put them up to auction, subject to a condition that the purchaser should take the stock in trade thereon at a valuation to be made by two persons, and that the amount of such stock was valued by them at 89*2l.* 6*s.* 4*d.*, and assigned for breach non-payment of the same. The second count was for lands bargained and sold for the remainder of the terms then unexpired, as well as for goods bargained and sold on the production of the leases under which the plaintiff's derive title; they are dated on the 15th of February, *habendum* from the day of that date; and the valuation given in evidence, after setting forth the prices of each article, contained a condition that certain pans then in use were valued as sound, but should any of them prove broken the first time of using, the valuers agreed to estimate an allowance to be made thereon; held, that it was immaterial to set out in the declaration the precise day on which the leases bore date, and that the valuation might be considered as absolute, and it was not proved that any of the pans were broken at the time specified, and, consequently, that there was no variance; *Welch v. Fisher*, 2 Moore, 378. It was averred in the declaration, that the defendant continued in possession until the end of the term; and, whilst he was in possession as such assignee, suffered the premises to be out of repair. The proof was, that he ceased to be assignee before the expiration of the term; held, that this was not any variance; *Burnett v. Lynch*, 5 B. & C. 589. In an action by A., his wife, and B., the declaration stated, that the plaintiff's had agreed to let to the defendant certain lands: that the defendant became tenant to the plaintiffs, and in consideration that the plaintiffs had promised the defendant to perform all things in the agreement by them to be performed, the defendant promised, &c. The agreement given in evidence purported to be made by an agent for the wife of A. and B. only, but A. had subsequently received rent from the tenant; held, that the consideration was not proved as alleged, inasmuch as A. was not bound by the agreement before the receipt of rent, and, therefore, was not a joint contractor *ab initio*. Another count stated, that the defendant was tenant to the plaintiffs, and in consideration had promised to use the lands in a husband-like manner; the proof was, that he had agreed to farm the land in a husband-like manner; to be kept constantly in grass; held, that this also was a variance; *Saunderson v. Griffith*, 5 B. & C. 909. An allegation in a plea, that A., by his writing, sold the aftermath of land to B. is not proved by evidence that, at an auction held for the purpose of selling it, B. was the purchaser, that B. gave a promissory note for the sum, and that B.'s name was written (by A.'s agent) in the printed catalogue as the buyer; *Symonds v. Ball*, 8 T. R. 151. Fixtures not separated from the freehold cannot be recovered under a count for

(d) *Respecting money and securities.\**

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5. *Connected with character.†*

goods sold; *Nutt v. Butler*, 5 Esp. 176. Where in a declaration of *assumpsit* on a written agreement for not permitting the plaintiff to take possession of certain apartments in the defendant's house, agreed to be let by him to the plaintiff in consideration of a certain annual rent, it appeared by the agreement that the fixtures in the rooms were specially enumerated therein; held, that an omission of the fixtures in the declaration was no variance; *Ward v. Smith*, 11 Price, 19.

\* If a declaration on a special agreement state as the foundation of the plaintiff's action, that the defendant was by his means enabled to receive a sum of money, and the evidence is that he was enabled to receive stock, it is a variance; *Jones v. Brindley*, 3 Esp. 205. But where the contract laid in the declaration was to deliver stock on the 27th of February; the contract proved was to deliver stock on the settling day, which at the time was fixed for and understood by the parties to mean the 27th of February; held, that the proof supported the declaration; *Wickes v. Gordon*, 2 B. and A. 335; S. C. 1 Chit. 60. Upon an allegation of a loan of lawful money of G. B., it is no variance that the loan is proved to have been of foreign coin, as pagodas; *Harrington v. Macmorris*, 5 Taunt. 228; S. C. 1 Marsh. 33. Declaration for 52*l.* 10*s.* for rum money, evidence, a note for 52*l.* 10*s.* for rum money. with an additional stipulation written after the signature of the note for a pint of rum per day; held no variance; *Baptiste v. Cobbald*, 1 B. and P. 7. In a declaration of *assumpsit* the inducement stated, that the defendant's father was indebted to the plaintiff in a certain sum, to wit, the sum of 26*l.* 13*s.* 6*d.* being the balance of a certain larger sum, to wit, the sum of 45*l.* 4*s.* 6*d.*; and it was afterwards averred, that in consideration that the plaintiff would forbear to sue the defendant's father for the recovery of the said balance of 26*l.* 13*s.* 6*d.* the defendant promised to accept a bill of exchange for the amount of such balance. It was proved that the balance due from the defendant's father to the plaintiff was 26*l.*; held, that this was no variance, as the sum was laid under a *videlicet* in the inducement, and as it was stated throughout the declaration to be the balance due, that the subsequent averments had reference to such inducement; *Bray v. Freeman*, 2 Moore, 114. Under a count for money had and received by three defendants, the plaintiff cannot give in evidence money had and received by them, and by a fourth partner who is now dead; *Spalding v. Mure*, 6 T. R. 363.

† If a plaintiff in an action for goods sold state them to be his goods, and they are his and another's, it is fatal; *Ditchburn v. Spraclin*, 6 Esp. 31. In an action against an attorney for suffering a debtor in custody, at the suit of the plaintiff, to be superseded, proof that such debtor was a married woman destroys the action, when the declaration states that she was indebted; *Lee v. Ayrton*, Peake, 119. In an action on the 15 Eliz. c. 4. (now repealed,) for following a trade, not having served an apprenticeship, if the declaration charge a particular trade to have been followed, and it appears to have been only a subordinate branch of another and principal trade, though forming a necessary part of it, it is a fatal variance; *Spencer. qui tam, v. Mann*, 6 Esp. 110. "The mayor, aldermen, and commons, in common council assembled," are not sufficiently described in the proceedings under a private act of parliament by "the mayor, and commonalty, and citizens," though, in fact, the latter include the former; *Rex v. Croker, Cowp.* 29. An action for use and occupation may be maintained by a corporation aggregate. In such an action by a dean and chapter, if the name of the present dean is mentioned at the beginning of the declaration, and it is afterwards laid that the occupation was by permission of the said dean and chapter, and it appears in evidence that the defendant occupied only in the time and by the permission of a former dean, this is a fatal variance; *Rochester, Dean and Chapter of, v. Pierce*, 1 Camp. 456. A foreign corporation may sue in this country by their corpo-

rate name. The plaintiffs sued by the name of "The National Bank of St. Charles;" the name given by the charter of the King of Spain was, "The Bank of St. Charles;" held no variance, the bank being in fact a national one; *St. Charles Bank v. De Bernarles*; 1 C. and P. 569; S. C. 1 R. and M. 190. An averment in an information for contemptuous behaviour to a court, that the court consists of A., B., and C., is made out by a bye-law, enacting that A., B., and C. are sufficient to hold the court, although they may be present, and act as members of it; *Rex v. Campbell*, 1 Campb. 91.

Averment in a declaration, that plaintiff was possessed of premises for the remainder of a certain term of years then unexpired therein, which he agreed to assign to the defendant, is supported by evidence of a tenancy from year to year; *Botting v. Martin*, 1 Campb. 317. In an action for an amercement in a court leet, if the declaration state the court to have been holden before the "steward" of the manor, and the evidence proves it to have been holden before the "deputy steward," it is a material variance; *Wyvil v. Shepherd*, 1 H. Blac. 162. So, where the declaration stated that the defendant was summoned to serve on the jury of the court leet and court baron, but the summons was to serve on the jury of the court leet only; *Grey v. Wheatley*, 1 H. Blac. 163. Where, in a declaration, the defendant is described as a meter for superintending the delivery of coals, his being a deputy coal meter satisfies that averment; *Davy v. Lowe*, 5 Esp. 70. In an action for assault and false imprisonment, with a justification, that the plaintiff having been guilty of a breach of the peace, the defendant had given him in charge to a peace officer, the person so described must be a person sworn into the office as a constable, not a patrol employed and paid to take up disorderly persons, or of that description; *Cliffe v. Littlemore*, 5 Esp. 39. Where the declaration stated that the defendant went before one R. C., Baron of Watefork, in the county of A., and charged the plaintiff with felony, and it was proved that the title of the magistrate was R. C., Baron of Waterpark, in the county of A., held, that this was a fatal variance; *Walters v. Mace*, 2 B. and A. 756; S. C. 1 Chit. 507. Declaration against the defendant as assignee of "all the estate, &c." in certain premises, evidence that he is assignee of "part," is a fatal variance; *Hare v. Cator*, Cowp. 765. The assignees under a joint commission against A. and B. may, in an action to recover a debt due to A. alone, describe themselves in the declaration as the assignees of A. alone; *Harvey v. Morgan*, 2 Stark, 17.

\* If a custom be set forth generally; and if it be proved that there are exceptions, it is a fatal variance; *Griffin v. Blandford*, Cowp. 62. Therefore where a custom to take heriots was set out as a general one, and on evidence given it appeared that there was an exception of *mesne seignories* and manor lands holden in ancient burgage; held a fatal variance; *Anon. Lofft.* 523. In trespass for breaking and entering a several fishery, if the plaintiff prescribes for the sole and exclusive right of fishing over four places in a navigable river, upon which right issue is joined, the prescription must be proved as extensively as it is laid; and if the right is shown to exist over three of these places, but not the fourth, this is a fatal variance, notwithstanding that the trespasses complained of were committed in a part of the river where the sole and exclusive right of fishery prescribed is proved to exist; *Rogers v. Alben*, 1 Camp. 309. But a new trial was granted where the lord of a manor justified under a custom to have the best beast on the tenant's death; and the custom proved was, that the lord should have the best beast or good; held, that the variance was fatal; *Adderby v. Hart*, 1 B. and P. 394. If in pleading, it is stated "that from time immemorial there had been a select vestry composed of a certain number of select persons," it is incumbent on the party making that averment to prove that the vestry had consisted of a definite number; *Berry v. Banner, Peake*, 157. So, if it had been stated that the vestry was composed of a certain select number of persons; *comme semble*, where a declaration set



## 7. Connected with deeds\*.

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out a right of common for all commonable cattle, and it was proved that plaintiff turned out all the commonable cattle he had, but that he had no sheep; held not a fatal variance; *Manifold v. Pennington*, 6 D. and R. 291; S. C. 4 B. and C. 161. A declaration, stating the plaintiff to have been entitled to common of pasture in respect of a messuage and land is established by proof of right of common only in respect of land; *Anon.* 1 Chit. 104.

\* In covenant, where, in sitting out the deed, the declaration stated that it was witnessed among other things that as well in consideration of, &c., and there was no word in the declaration to answer to the phrase "as well," and only part of the consideration was stated; held, that this was a fatal variance; *Swallow v. Beaumont*, 2 B. & A. 765; S. C. 1 Chit. 518. In an action of covenant the declaration stated, that by a certain indenture it was witnessed that, as well in consideration of certain furnaces to be erected by the plaintiff, T. R. B. did demise, &c. The defendant pleaded non est factum. On producing the deed in evidence, it appeared to be that, as well in consideration of the erection of the furnaces, as also for building houses, and payment of rent, T. R. B. did demise, &c.; Held, that this was a fatal variance. In covenant on a lease, a mistake in the name of the person stated in the demise as the late tenant of the premises is a fatal variance; *Bowditch v. Mawley*, 1 Campb. 285. A variance in setting out one of several covenants in a lease, on which breaches were assigned, viz. the Cellar-beer-field, instead of the Alber-beer field, being considered as part of the description of the deed declared on, though the plaintiff waived going for damages on the breach of that covenant, is fatal; *Pitt v. Green*, 9 East, 188. In covenant for not repairing, if the covenant to repair contains an exception of casualties by fire, it is fatal on non est factum to state it in the declaration as a general covenant to repair, omitting the exception; and the Court of Common Pleas would not allow the plaintiff to amend on payment of the costs of the trial, but left him to his remedy by bringing a fresh action; *Brown v. Knill*, 5 Moore, 164; S. C. 2 B. & B. 395. In covenant for not repairing, if the covenant to repair contains an exception of "fire and all other casualties," it is fatal, on non est factum, to state it as a general covenant to repair omitting the exception; *Tempany v. Bumand*, 4 Camp. 20. In an action of covenant for not repairing premises demised, the declaration stated that the plaintiff "demised certain premises, with the appurtenances, (except as therein excepted,) to hold, &c. except, &c., for the term of twelve years, except the last day thereof;" the lease being produced in evidence in support of the declaration was found to contain no exception of "any part of the premises," but only an exception of "the last day of the term;" held not to be a fatal variance on agreement of a rule for entering a non-suit on that objection, the allegation of the exception being either satisfied in the lease or it might be rejected as surplusage *Williams v. Hayes*, 9 Price, 642. A lease containing the covenant by the lessee to repair the premises at all times (as often as need and occasion should require), and "at farthest within three months after notice," is one entire covenant; the former part of which is qualified by the latter; and the plaintiff having treated this in his declaration as an absolute covenant to repair, and omitted the latter part of the clause containing the notice; held, that the variance was fatal; *Horsfall v. Testar*, 1 Moore, 89. In an action of covenant on a lease of the veins of coals under certain farms and lands therein described, situate in the parishes of B. and M., then in the several occupations of A., B., and C., with liberty to dig any pits, shafts, levels, soughs, &c.; the declaration varied from the deed—first, in stating that the land was set out by admeasurement, instead of by reputation; second, in changing the word "soughs" to "sloughs;" third in stating the land to be situate in the parish of B. and M., instead of the parishes of B. and M.; and fourthly, in stating them to be in the occupation of A. B. and C., instead of in the several occupations of A. B. and C.; held that the first and third variances were fatal, but that the second and fourth were immaterial; *Morgan v. Edwards*, 2 Marsh, 96; S. C. 6 Taunt. 695. Plaintiff covenanted to build two houses for 500l. by a certain day and averred in an action of covenant for the money that the houses were built in the time. Evidence that the time had been enlarged by parol agreement, and the houses finished within the enlarged time, did not support the declaration; *Littler v. Holband*, 3 T. R. 590. Where plaintiff declared in covenant that defendant demised to him a wharf and storehouses, &c., the word in the deed being storehouse, it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only upon a covenant by defendant not to suffer a wharf to be erected on his estate to the injury of said wharf, per quod plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, storeroom, &c.; *Hoar v. Mill*, 4 M. & S. 470. Where a declaration in covenant by the reversioner against A., the assignee of a lease for years, (granting licence to B. to continue a certain channel open through the bank of a navigable river upon certain conditions); imported that the grantors had the entire right and absolute possession of the channel, and full power to grant the use of it to B., and it appeared from the indenture, that they were described merely as the persons who had the greatest proportion or share in the profits of

[ 280 ] the navigation, and that they, by virtue of all or any powers or authorities vesting in or enabling them, granted the licence to B., his executors, administrators, and assigns; held that this was a variance, as the grantors had not the privilege which the deed as set out in the declaration purported to grant; *Portmore (Earl) v. Bunn*, 3 D. and R. 145; S. C. 1 B. and C. 694. In an avowry founded upon a distress for rent, the defendant averred that the plaintiff held certain strata or veins of iron-stone under a lease which contained a proviso, that "if the stone should not be wholly gotten or wrought out within the term of eight years from the commencement of the demise," the rent in respect of such as should remain ungotten should be paid to the lessor "on the production of the lease;" the proviso contained the additional words "if the same should be found to be gettable;" held, that this was a fatal variance, and that the plaintiff was entitled to recover on *non est factum*, and it seems he would only be liable to pay for such stone as could be gotten, and not for that which was not gettable; *Adam v. Duncalfe*, 5 Moore, 475. In covenant in setting out a deed, if the word "an" is written instead of "one," and the name "Bart" written instead of "Bart" it is no variance; *Hill v. Saunders*, 1 C. and P. 80. Nor is the stating a lease to be for twenty-one years, and proving it to have been granted for that term, determinable at the option of either party at the end of seven or fourteen years. *Semble*, that it is not a misdescription of a lease to state it as commencing on a particular day, when the habendum is from that day; *Walsh v. Fisher*, 2 Moore, 378. Where plaintiff declared in covenant on a demise of lands, and the demise was of all that piece or parcel of ground and premises containing, by estimation one acre; held, that this was not a variance; for one piece will satisfy the term lands; *Birch v. Gibbs*, 6 M. and S. 115.

In covenant on a lease for not repairing, the instrument was described in the declaration to be made by the plaintiff of the one part, and the defendant of the other. On the production of the lease in evidence, it appeared to have been made by the plaintiff and his wife of the one part, and the defendant of the other, held, that this was no variance, although the premises demised were the property of the wife before marriage; *Arnold v. Revault*, 4 Moore, 66; S. C. 1 B. and C. 433. A declaration on a lease which stated that the plaintiffs derived their titles from two lessors only, and that two other lessors, who were also parties to the demise, had no interest therein, was supported by the production of the lease, which appeared to be a demise by the four; *Wood v. Day*, 1 Moore, 389. A declaration in covenant for the assignment of a share in certain stock professed to set out the covenant, and describe it as a covenant to assign a certain sum of 2,000*l*. The defendant on oyer set out the deed, and demurred as for a variance, that the covenant was to assign stock, not money; held to be no variance; and even if it were, that the defendant should have pleaded *non est factum*, and not have demurred, on the ground that where a defendant sets out a deed on oyer, on which the declaration is framed, he cannot, on demurrer, take advantage of a variance in an immaterial part between the deed as stated in the declaration and as set out on oyer; *Ross v. Parker*, 2 D. and R. 662; S. C. 1 B. and C. 358; held, that in an action of covenant against a mortgagor, a statement that the defendant bound himself, his heirs, executors, &c., was no variance, though the word "heirs" was not mentioned in the covenant; *Humborough v. Wilkie*, 1 Chit. 518; S. C. 4 M. and S. 474. Where, in a declaration of trover, a deed was described as a certain deed of assignment, purporting to be made between J. S. of the one part, and W. R. of the other part, and purporting to be a conveyance from J. S. to W. R. of certain tenements therein mentioned; and on the production of the deed, it appeared to be a conveyance by lease and release between the same parties; held to be no variance, and that it was sufficiently described in the declaration; *Harrison v. Vallance*, 7 Moore, 304; S. C. 1 Bing 45. Where the defendants became sureties in a composition deed, by which the debtors covenanted to pay their creditors by certain instalments within sixteen months from the date thereof, viz. two shillings in the pound within four calendar months, a like sum within eight calendar months, a like sum within twelve calendar months, and the fourth or last instalment within sixteen calendar months; and on the record it was stated that the creditors were to receive their four respective instalments on or before the expiration of sixteen calendar months from the date thereof, but the instalments were alleged to be payable within four, eight, twelve, and sixteen months, generally omitting the word "calendar;" held, that this was no variance, as the deed clearly showed that the parties meant calendar months; *Cockell v. Gray*, 4 Moore, 413; S. C. 3 B. and C. 186. Where a declaration stated, that, in consideration that the plaintiff would assign to the defendant a bill of exchange, and that he did assign it to the defendant, and a promise by the latter accordingly; and it was proved that the parties had agreed that the plaintiff should give up the bill to the defendant; the latter, however, paying over the proceeds to the plaintiff, and in pursuance of the agreement, the plaintiff by deed assigned to the defendant the bill and all sums of money due thereon; for the defendant's own use, and the defendant covenanted to pay the plaintiff a sum equal to any money he should receive on account of the bill; held that, as the declaration imported that the plaintiff had made an absolute assignment of the bill, and as the assignment in evidence was conditional only, it was a fatal variance; *Vansandau v. Bruit*, 5 B. and A. 42. Where the grantee of an annuity pays the purchase money on a particular day into a banker's hands, in the joint names of his attorney and the grantor, to be paid over to the grantor on the execution of a particular deed, and it is

8. Connected with horses.\*  
 9. Connected with libles. See ante, tit. Libel.  
 10. Malicious prosecution †  
 11. Connected with penalties. ‡  
 12. Policies of insurance. §  
 13. Connected with process. ||

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done at a subsequent day, the memorial properly states the payment as made on the latter day; *Coara v. Giblet*, 4 Esp. 231. So, in covenant, if, after a plea of *non est factum*, the defendant at the trial admits the due execution of the specially mentioned in the declaration, he may still take advantage of a variance; *Goldie v. Shuttleworth*, 1 Camp. 70. And in an action of covenant, it is no objection, under the plea of *non est factum*, that the deed contains material qualifications of the covenants set out, which qualifications are not noticed in the declaration; *Gordon v. Gordon*, 1 Stark. 294.

\* If the defendant took another horse in part payment, it is no variance to state that the whole price was paid in money; *Hands v. Burton*, 9 East, 349; *Brown v. Fry*, Selw. N. P. 630; but see *Harris v. Foubie*, cited 1 H. B. 287. If an agent sell to A. two horses belonging to B. and C., and warrant them; A. must not declare as upon the sale of one horse, the contract being entire; *Symonds v. Carr*, 1 Campb. 361.

† A variance between the charge actually made, and that stated in the declaration, will be fatal. Thus, where it was stated in the declaration that the defendant imposed upon the plaintiff the crime of felony, and upon the production of the information before the justice, it appeared that the charge amounted only to a civil injury, though the warrant was to arrest the plaintiff on suspicion of felony, the variance was held fatal; *Leigh v. Webb*, 3 Esp. 165. But where the declaration averred that the defendant charged the plaintiff with assaulting and beating him, and procured a warrant to apprehend him for his said offence, and the charge in fact made was for assaulting, and striking; and the warrant produced recited the charge to be for violently assaulting, it was held to be no variance; *Byne v. Moore*, 5 Taunt. 187. And where the plaintiff declared that the defendant maliciously charged the plaintiff with having feloniously stolen certain articles his property, and it was proved that the defendant laid an information before a magistrate, in which he deposed that the said articles had been feloniously stolen, and that he suspected and believed, and had good reason to suspect and believe, that they had been stolen by the plaintiff; it was held that the evidence supported the declaration; *Davis v. Noake*, 6 M. & S. 29; 1 Stark. 377, S. C. diss. *Bayley J.* So where the plaintiff declares that the defendant maliciously, and without probable cause, preferred an indictment (setting it forth), the averment is proved if some charges in the indictment were maliciously and without probable cause preferred, though there was good ground for preferring others of the charges; *Reed v. Taylor*, 4 Taunt. 616.

‡ To describe a precept as directed to "the bailiffs of the borough," instead of "the bailiff" is immaterial; *Wane v. Hoskins*, 2 H. Bl. 113. On the Post-horse Act the number of horses charged or let, and not accounted for, may exceed the truth, *Radford v. McIntosh*, 3 T. R. 632; nor need the time of letting be proved as laid; *Sergeant v. Tilbury*, 16 East, 416. Under the Non-residence Act, the temporal limit must be proved or laid, *Hardy v. Cathcart*, 5 Taunt. 2; and consolidated benefices may be described as single benefices; *Wilson v. Von Mildert*, 2 B. & P. 399.

§ Goods are insured at and from Mogadore to London. The declaration avers "that after the loading the goods, the ship departed on her intended voyage, and, while in the course of her said voyage, was lost by perils of the sea," held that this was a material allegation, and therefore the ship having been lost while at her mooring, and before the cargo was completed, the insured could not recover; *Abitbol v. Bristow*, 2 Marsh. 157; S. C. 6 Taunt. 464. In an action on a policy of insurance the declaration stated that "after" the making of the policy the ship sailed, the evidence was that she sailed "before;" held that the variance was immaterial; *Peppin v. Solomons*, 5 T. R. 496. If a declaration aver a loss to have happened by goods being seized "in a forcible and hostile manner by certain persons enemies of our Lord the King to the plaintiff unknown," and the evidence prove they were seized "by two Spanish government brigs, for importing goods contrary to the Spanish laws;" the variance is fatal; *Matthie v. Potts*, 3 B. & P. 23. A policy is effected on the plaintiff's share of goods valued at 500l., but upon its turning out that the plaintiff's interest was larger, the words were added in the margin of the policy on the plaintiff's goods, "say one fifth valued at 1000l." to which the defendant's initials were subscribed, the declaration need not notice the original stipulation, *Robinson v. Tobin*, 1 Stark. 336.

|| An allegation that an action was pending in his Majesty's Court of the Bench at Westminster is not sustained by proof of a *pluries* bill of Middlesex, for by such allegation the common bench must be intended; *Impey v. Taylor*, 3 M. & S. 166; and see *Renals v. Smith*, 2 Marsh. 258, where the declaration, in reciting the writ, stated that the sheriff was commanded to take the said

[ 293 ] defendant, J. S, to answer, &c., and also to a bill of the said plaintiff against the said defendant; held, that it was a variance; *Large v. Attwood*, 1 D & R. 551. If the declaration in an action for a false return on a *fiery facias*, in setting out the writ, states the indorsement to levy the sum, together with the sheriff's poundage, officer's fees, and other legal charges and incidental expenses attending the same, and the writ when produced is to levy the sum, together with the sheriff's poundage, officer's fees, &c. it is a variance; *Stiles v. Rawlins*, 5 Esp. 123. In an action against the sheriff on the 8 Anne, c. 14, for taking goods off the premises without paying rent, the declaration stated that the sheriff, by virtue of and under pretence of a certain writ of our said Lord the King, before the King himself, before that time sued forth, &c. took the goods, &c.; the writ under which the goods were seised issued from the Common Pleas; held, a fatal variance; *Sheldon v. Whittaker*, 7 D. & R. 123; S. C. 4 B. & C. 657; 1 R. & M. 266. Declaration for an escape stated, that the debtor was arrested, and gave bail; that bail above was put in before a judge at chambers *prout patel per recordum*, and that the debtor surrendered in discharge of his bail, and afterwards escaped. The examined copy of the entry of the recognizance of bail stated it to have been taken before the court at Westminster; held, 1st. That the plaintiff was bound to prove the bail to have been taken as alleged, and therefore that the variance was fatal; and, 2d. That an entry in the filacer's-book, stating that the recognizance to have been taken before a single judge, was not admissible in evidence, and would not cure the objection even if admitted; *Bevan v. Jones*, 6 D & R. 483; S. C. 4 B. & C. 403. Where in an action for false imprisonment the record set forth a few of the first words in a bill of Middlesex, and then added an *et cetera*; held to be no variance; *Wilson v. Mawson*, 1 T. R. 237. Where a declaration stated a *latitat* against Donner and J. Doe, with an *ac etiam* against Donner for 30l., and the writ produced was against Donner and two others, and not against J. Doe; held to be no variance; *Hendray v. Spencer*, 1 T. R. 238. An averment of a writ and return to this effect, "as by the said writ and return thereon now remaining in court more fully appears," is not supported unless it has been filed, and an office copy is offered in evidence; *Turner v. Eyles*, 3 B & P. 456; S. C. 5 Esp. 8. A writ directed generally to the sheriff of a county may be described in pleading as directed to the individual by name who was in fact sheriff of the county when the writ issued; *Batchellor v. Salmon*, 2 Campb. 525. Where the declaration in an action for negligence sets out a writ, it is not sufficient that the name of the party and the name in the writ have the same sound; any mis-spelling of the name is fatal; *Rrown v. Jacobs*, 2 Esp. 726. In case against the sheriff for an escape, the declaration stated that the plaintiff sued out an attachment of privilege, by which said writ our Lord the King commanded the defendants, &c. to attach A. B., &c. to answer the said plaintiffs of a plea of trespass on the case, to the damage of the said plaintiffs of 30l. &c. The writ produced did not contain the words "to the damage," &c.; held no variance; *Cousins v. Brown*, 1 R. & M. 291. But in an action on the case against the sheriff for negligent and wrongful conduct in conducting the sale of the plaintiffs under a writ of *fiery facias*, by which they were sold much under value, wherein, stating the substance of the writ, the Court alleged that the sheriff was commanded to levy 80s. awarded to F. C. for his damages sustained by occasion of the detaining the debt, that is proved by the writ, which stated that the 80s. were awarded to F. C. for his damages sustained, as well by reason of detaining the debt as for his costs, &c., for costs are in a legal sense included in the word damages; *Phillips v. Bacon*, 9 East, 298. In an action for bribery at an election, where the declaration set forth the precept from the sheriff to the portreeve of a borough, the improper insertion of the word "if" in such precept is not a fatal variance, but it will be rejected as surplusage; *King v. Pippet*, 1 T. R. 235. In an action for bribery on the stat. 2 Geo. 2, c. 24, it is not a material variance if the declaration state the precept to have issued to the bailiffs of the borough, but the precept produced in evidence is directed to the bailiff; *Warre v. Harbin*, 2

## 14. Records.\*

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H. Bl. 113. Where the declaration stated the precept to be directed to the mayor only, and the precept proved it was directed to the mayor and burgeses, held to be no variance; *Croming v. Sibley*, 1 T. R. 239. In an action for a malicious arrest, an allegation that the plaintiff gave bail to the sheriff for his appearance at the return of the writ is not supported by evidence that he paid the debt, and 10*l.* for costs, into the hands of the sheriff, but he may still maintain the action although he cannot recover for the consequential damage; *Bristow v. Haywood*, 4 Campb. 213. In an action on a bail-bond against one of the sureties, the declaration averred, that by a writ of *latitat* the sheriff was commanded to take one Francis I., by the name of John I.; held that this averment was not supported by evidence of a *latital* in the common form, commanding the sheriff to take John I., although the bail bond was signed by the principal, Francis I., arrested by the name of John I., and the plaintiffs offered to prove that this person was their debtor, whom they meant to hold to bail; *Scandover v. Warne*, 2 Campb. 270. In an action against the defendant for negligence as an attorney, in not prosecuting a debtor of the plaintiff's to judgment, the return of the writ on which the debtor was arrested being laid to be in the 25th year, &c., and the writ itself appearing to have been returnable in the 24th year, &c., this was held to be a fatal variance, even though the day of the return was alleged in the declaration under a *videlicet*; *Green v. Rennett*, 1 T. R. 656. In an action for malicious prosecution, a judge's order to stay proceedings in the first suit on payment of costs, and proof of such payment, is not sufficient evidence that the first suit is at an end; *Hick v. French*, 8 Esp. 80; and see *Harvey v. Morgan*, 2 Stark. 19. If an action is brought against a justice of peace, and notice given under stat. 22 Geo. 2, and signed by the attorney for the plaintiff, describing himself as of London, if in fact it is in Westminster, it is fatal; *Shears v. Smith*, 6 Esp. 138.

\* An averment in a declaration of the day of a former trial must exactly agree with the record to be produced in evidence to support it, though it be laid under a *videlicet*; *Pope v. Foster*, 4 T. R. 590. But in an action on the case for a malicious prosecution, it is not material for the plaintiff to prove the exact day of his acquittal, as laid in the declaration, so that it appears to have been before the action brought; and therefore a variance in that respect between the day laid and the day stated in the record, which was produced to prove the acquittal, is not material, the day not being laid in the declaration as part of the description of such record of acquittal; *Purcell v. Macnamara*, 9 East, 157. In an action for maliciously, &c. arresting and holding the plaintiff to bail, in which the declaration, in setting out the judgment by default in the former action, stated, that "it was thereupon considered that the then plaintiffs should take nothing by their said suit, but that they and their pledges to prosecute should be in mercy, &c.," it is no material variance if the record produced in evidence have not the words, "and their pledges to prosecute," but only have an "&c.," for these words may be rejected as surplusage, the substance of the allegation being the discontinuance of the former suit, *Judge v. Morgan*, 13 East, 547; and see *Reed v. Taylor*, 4 Taunt. 616; where, in an action for a malicious prosecution, the record, in setting out the indictment stated the words to be, "then and there did make an assault," and in the indictment they were stated as, "did then and there make an assault," held to be no variance; and, even if it was, that it might be altered before trial; *Freeman v. Askill*, 1 C. & P. 137. In an action on a judgment, if the declaration states the judgment, to have been recovered in a term different from that which appears on the record, it is a failure of record; *Rastall v. Straton*, 1 H. Black. 49. It is also a variance if the declaration states the judgment against one defendant only, when it was against more than one. An allegation in a declaration, with a *prout patet*, &c., that the plaintiffs by the judgment of the Court recovered against the bail, is not proved by the produc-

[ 235 | tion of the recognizance of bail, and the *scire facias* roll, which latter concluded in the common form, "therefore it is considered that the plaintiffs have their execution thereupon against the bail," for this is an award of execution, or, at most, a judgment of execution, and not a judgment to recover; *Phillipson v. Mangles*, 11 East, 516.

Where, in an action for a malicious prosecution there is an allegation in the declaration that the person prosecuted was "acquitted by a jury, in the court of our Lord the King, before the king himself at Westminster, before the chief justice," it is not supported by a record from which it appears that the trial took place before the chief justice at Nisi Prius; *Woodford v. Ashley*, 2 Campb. 193; 11 East, 508. *Trespass quare clausum fregit*; justification under a *distringas*, in a plea of trespass, at the suit of J. S. against defendant, replication that, before the *distringas* issued against defendant, he appeared to answer J. S. in the plea of trespass in the said plea, mentioned to the said writ sued out by J. S. for that purpose, to wit, a *clausum fregit*, issued out of Common Pleas, *prout patet*, &c., defendant rejoined *nul tiel record*; held that the record of appearance to a *clausum fregit* issued out of Chancery did not support the replication, and that the words which followed the *scilicet* being material could not be rejected; *Myers v. Kent*, 2 N. R. 463. In an action on a foreign judgment for the non-performance of certain promises and undertakings, it appeared, on the production of the production of the record in the former action, that judgment was entered for the non-performance of one promise only; it seems that this is a fatal variance; *Black v. Lord Braybrook*, 2 Stark. 7. An averment that the defendant had voluntarily permitted his bill to be discontinued for want of prosecution thereof, with a conclusion to the record, is not proved by showing that there had been actually a rule to discontinue regularly taken out; the record having been averred, it must be proved; but had the allegation of the discontinuance been general, it would have been sufficiently proved by the rule to discontinue and evidence of the payment of costs; *Gadd v. Bennett*, 5 Price, 540. It is not a fatal variance from a record to omit the description of a person named in it, unless some ambiguity is thereby produced; *Anvey v. Long*, 1 Campb. 15. A statement in a declaration of a judgment recovered against the "Earl of S.," is not a variance from the record which calls him "Baron S." if proof of identity be given; *Lord Suffield v. Bruce*, 2 Stark. 175.

An averment of a judgment obtained against A. B. is not proved by evidence of a judgment against A. B. and C. B.; *Readshaw v. Wood*, 4 Taunt. 13. Where defendant had been sued as the Right Honourable Hamilton Fleming, Earl of Wigtown, having privilege of peerage, and judgment was given against him; in debt on the judgment he was called Hamilton Fleming, Esq., commonly called Earl of Wigtown: held that the variance was fatal; *Blackmore v. Fleming*, 7 T. R. 447. On an indictment for perjury, in answer to a bill in Chancery, it is sufficient evidence of the defendant having sworn to the truth of the answer to prove his signature to it and the signature of the Master in Chancery before whom it purports to be sworn; *Rex v. Benson*, 2 Campb. 508. An allegation that to an information in Chancery against T. Eamy, the answer of the said T. Eamy was filed, is supported by an office copy of an answer, entitled "the answer of T. Eamy," although this be signed T. Aney; *Salter v. Turner*, 2 Campb. 87.

In an action against the sheriff for a false return to a writ of *fieri facias*, issued on a judgment on a *scire facias*, if the declaration states that the sum recovered by the *scire facias* without the costs, it is good if the judgment in the *scire facias* states them so distinctly; *Phillips v. Eamer*, 1 Esp. 355. Declaration in case of a false return of a writ of *fieri facias*, stated that the plaintiff by judgment of the Court recovered 89l. 10s. adjudged to him for his damages by him sustained, as well by occasion of the not performing several promises, as for his costs, &c., concluding with a *prout patet per recordum*. Upon production of the judgment, it appeared that a *remittitur* had been entered as to all he counts in the declaration, except the first, and that the damages were

- 15. *Connected with rent.\**  
 16. *Slander.* See *ante*, tit. *Slander*.  
 17. *Connected with warranty.†*

awarded for the not performing the promise in that count mentioned only; held a fatal variance; *Edwards v. Lucas*, 8 D. R. 98; S. C. 5 B. & C. 339. Where in an action for a false return to a *fiery facias*, the declaration stated that the plaintiff in Trinity term, 2 Geo. 4, recovered the judgment, &c. as appears by the record, and the proof was of a judgment in Easter term, 3 Geo. 4; held that this was no variance, for that the averment, as appears by the record, was surplusage, and might be rejected, inasmuch as the judgment was not the foundation of, but mere inducement to, the action; *Stoddart v. Palmer*, 4 D and R. 624; S. C. 3 B. and C. 2. Where in case against the sheriff for taking insufficient pledges in a replevin bond, the declaration set out the record, and averred under a *videlicet* that he plaint in the county court was levied before A., B., C., and D., as suitors of the court, and it appeared from the record that it was levied before E., F., G., and H.; held to be no variance, as it was unnecessary to state or prove the names of the suitors, and that the allegation might be rejected as surplusage; *Draper v. Garratt*, 3 D. & R. 226; S. C. 2 B. & C. 2. Where the record agreed with the declaration, but there was a variance between the record and the issue delivered, the mistake being in the issue, the Court of Common Pleas refused to set aside the verdict, or grant a new trial; *Jones v. Tatham*, 8 Taunt. 634. In *assumpsit* for not indemnifying the plaintiff in consequence of his having become bail for A. in an action at the suit of B.; it was stated that B. recovered against the plaintiff in Michaelmas term. The judgment given in evidence was in Hilary term; held that this was no variance, inasmuch as this was not matter of description, but an allegation in substance, that the judgment had been obtained before the commencement of the action; *Phillips v. Shaw*, 4 B. & A. 435. In an action on the case against a sheriff, for negligence in losing a replevin bond, given by a party for prosecuting his suit with effect in the county court; the declaration averred that the plaint had been removed out of "the county court of the said sheriff," by *re. fa. lo.*, &c.; and it appeared that at the time of removal the sheriff who had taken the bond was out of office; held no variance, and that the word "said" might be rejected as surplusage; *Purveau v. Bevan*, 8 D and R. 72. The plaintiff in an action of debt against a sheriff for an escape of a debtor of the plaintiff in execution under a *capias ad satisfaciendum*, alleged in his declaration, Michaelmas term, 2 Geo. 4, issued on a judgment by default, that he (the plaintiff) therefore, to wit, in Hilary term, in the second year of the reign of the now king, recovered judgment against the debtor in an action of assumpsit, as by the record and proceedings thereof now existing, &c. more fully and at large appear. *Semble*, that the allegation of a judgment recovered in Hilary term, 2 Geo. 4, was proved by a record of a judgment recovered in Hilary term, 1 & 2 Geo. 4; *Bennett v. Isaac*, 10 Price, 154. Where the declaration in an action for negligence sets out a writ, it is not sufficient that the name of the party and the name in the writ have the same sound, any mis-spelling of the name is fatal; *Brown v. Jacobs*, 2 Esp. 726.

\* A variance between the demise stated and that proved will be fatal; but where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms and the use of the furniture; it was held to be rightly stated according to the legal effect, for the rent could not issue out of the chattels; *Walsh v. Pemberton*, Selw. N. P. 583. A variance in the statement of the rent will be fatal, as where in the declaration it was stated to be 15*l.* per annum, and appeared in evidence to be 15*l.* and three fowls; *Sands v. Ledger*, 2 Ld. Raym. 793.

† Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise not qualifying

or varying in any respect the parts so complained of as broken, as where the plaintiff declared that in consideration of his redelivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which would be worth 80*l.*, and be a young horse, and then alleged a breach in both these respects; held sufficient, though the proof was not only of a promise that the second horse should be worth 80*l.*, which it was not, and be a young horse, but also of a warranty that it was sound, and had never been in harness; *Mills v. Sherwood*, 8 East, 7. Proof that the defendant agreed to sell his horse, warranted sound, to the plaintiff for 31*l.* 10*s.*, and at the same time agreed, that if the plaintiff would take the horse at that value, he, the defendant, would buy another horse of the plaintiff's brother for 14*l.* 14*s.*, and that the difference only should be paid to the defendant, will support a count charging only that in consideration that the plaintiff would buy of the defendant a horse for 31*l.* 10*s.* the defendant promised that it was sound, and that in fact the plaintiff did buy the horse for that price, and did pay to the defendant the said 31*l.* 10*s.*; *Hands v. Burton*, 9 East, 349. An averment that defendant warranted a horse to be sound; proof that defendant warranted a horse to be sound everywhere, except a kick on the leg; held, that this was a qualifying warranty, and constituted a fatal variance between the declaration and the evidence; *Jones v. Cowley*, 6 D. and R. 533; S. C. 4 B. and C. 445.

Where, in *assumpsit* on the warranty of a horse, the contract declared upon was in consideration of a purchase for a certain price, to wit, 26*l.* 5*s.*, and it appeared that the horse was bought jointly with another at one entire price of 60 guineas, the variance was held fatal; *Hart v. Dixon*, 1 Selw. N. P. 104. Plaintiff purchased a horse for 55*l.*, the defendant warranting him sound, and agreeing to give 1*l.* back if the horse did not bring plaintiff 4*l.* or 5*l.* The averment in the declaration was that, in consideration the plaintiff would buy of the defendant a horse for a certain price, to wit, 55*l.*, the defendant undertook the horse was sound: held at variance, *Gazelee, J., dissentiente*; *Blyth v. Bampton*, 3 Bing. 472. Where a plaintiff declared on a warranty of a horse bought with money, and produced a receipt for the sum containing the warranty, and it appeared that in fact he had given a mare in exchange at a certain valuation; held that there was no variance, as the defendant admitted by the receipt that he had taken the mare as money; *Brown v. Fry*, 1 Selw. N. P. 663. Where the declaration stated that in consideration that the plaintiff would buy of the defendant forty-five sheep for 54*l.* 11*s.* 6*d.*, the defendant undertook and promised that they were sound, and the plaintiff proved the price to be 54*l.* 12*s.* 6*d.*, held that the variance was fatal where the sum was not laid under a *videlicet*; *Dunstan v. Trithan*, 3 T. R. 67.

\* Where in an action of *assumpsit* by three co-plaintiffs for a breach of contract, they were rightly named in the writ, but the surname of one of them was omitted by mistake in the declaration, issue, and Nisi Prius record, and the defendant pleaded a tender, and paid money into court generally on the whole declaration, and at the trial failed to establish the tender, and the jury after an objection had been taken as to the omission of the surname, found a verdict for the plaintiffs, with nominal damages only, and leave was given them to move to increase it to the extent of their demand, if the Court of Common Pleas should be of opinion that the omission was immaterial, they discharged a rule obtained for that purpose, as the plaintiffs might have amended the pleadings and record at any time before the trial, and as they had their remedy by bringing a fresh action; *Longridge v. Brewer*, 7 Moore, 522; S. C. 1 Eing. 143. In a *qui tum* action, if the declaration do not appear on the record to be filed within a year of the writ, it is necessary to connect it with the writ by evidence of the time when the declaration was filed, and showing the writ to be continued on the roll down to that time. In the Court of Common Pleas, the *placitum* being always entitled of the term in or



6th. *As to statutes.\**  
 (B) CRIMINAL PROCEEDINGS†

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after which the trial takes place, it furnishes no evidence of the date of the declaration; *Thistlewood, qui tam, v. Cracroft*, 6 Taunt. 141. Where the bill was filed against three persons by name, and on entering the finding of the jury on the *postea* part of the Christian name of one of them was omitted; held to be no ground of error; *Mary v. Prye*, (in error), 8 Moore, 297; S. C. 1 Bing. 314. The Court will not set aside a verdict after defence, upon the ground of a variance between the paper issue delivered and the *Nisi Prius* record; *Leeman v. Allen*, 1 Wils. 160. Nor will they grant a new trial; *Mather v. Brinker*, 2 Wils. 243. The Court refused to set aside the verdict in ejectment, on the ground that there was a variance between the description of the premises in the *Nisi Prius* record upon which the plaintiff recovered and the issue, it not being stated how the premises were described in the declaration delivered; *Doe, d. Cotterill, v. Wylde*, 2 B. & A. 472. After a defence made on a writ of inquiry, the defendant is not allowed to take advantage of a mistake, in the declaration; *Freeland v. Hunt*, 2 Wils. 380.

\* A variance in a declaration, by describing a statute on which the action was brought to be a statute of the 4 Philip & Mary, whereas it was a statute made in the 4 & 5 Philip & Mary, it is fatal; *Rann v. Green*, Cowp. 474. If the defendant undertake to set forth the stat. 23 Hen. 6. c. 9. in a plea to an action on a sheriff's bond, a mis-recital is fatal; *Boyce v. Whitaker*, 1 Doug. 94. By stat. 28 Eliz. c. 4. sheriffs are liable to a penalty for taking more than a certain sum on executions "upon the body, lands, goods, or chattels;" a declaration on this act, in reciting the statute, stated it thus: "body, lands, goods, and chattels," and this was held to be a fatal variance in arrest of judgment; *King v. Marsach*, 5 T. R. 771. In an action for the penalty of the stat. 12 Anne, c. 16. the declaration stated a specific sum of money to have been lent (in which the usury consisted), but the evidence was that the loan was part in money and the rest in goods of a known value, which the party receiving the loan agreed to take as cash; this was good evidence to support the declaration; *Barbe v. Parker*, 1 H. Black. 283. In a declaration on the Lottery Act, if the plaintiff avers the taking of a certain sum for the insurance of a number, and the proof is that the sum was given for the insurance of several numbers, it is a fatal variance; *Philips, qui tam, v. Mendez, da, Costa*, 1 Esp. 59. An averment in a declaration on the 11 Geo. 2. c. 19. s. 3. to recover double the value of goods removed in order to prevent a distress, that a certain sum was due for rent before the goods were removed, need not be precisely proved as laid, *Gwinnet v. Philips*, 3 T. R. 633; and the notice of distress which alleged a different sum to be due was held immaterial. *Quære*, whether by the stat. 43 Geo. 3. c. 46. s. 5. "expences of execution" include the expenses of levying. But where a writ was indorsed to levy a certain sum, an interest accrued from a given day, and "besides." &c.; and in the declaration after the words "besides," &c., "sheriff's poundage, officers fees, and expences of levying," were introduced under a *videlicet*; held, that this was no variance, as they might be rejected as surplusage; *Rumsey v. Tuffnell*, 9 Moore, 425.

† The 9 Geo. 4. ante 259, applies to criminal as well as civil proceedings. Even before the statute, where the omission or addition of a letter does not change the word so as to make it another word, the variance is immaterial, otherwise it is material; *Rex v. Beach*, Cowp. 229; S. C. 1 Dougl. 194. In an indictment for perjury a variance in the word "undertood" for "understood," held not material; *Rex v. Beach*, Cowp. 229; S. C. Loft. 785; 1 T. R. 237. And if it be alleged in pleading that an instrument issued under the great seal of Great Britain, and evidence be given of an instrument issuing under the great seal of the United Kingdom, this is no variance; *Rex v. Bullock*, 1 Taunt. 71. If an indictment for perjury, purporting to set out the substance and effect of a bill in Chancery, recites the bill as for a specific

[ 289 ] performance of an agreement between the prosecutor and defendant (*inter alia*) "for a lease of land adjoining to the new houses," and in the bill it was stated to be "adjoining the new house," held to be a fatal variance, although the perjury was not assigned on any thing sworn as appertaining to this particular clause; *Rex v. Spencer*, 1 R. & M. 98. And it was considered not a variance in an indictment for perjury, that it stated a bill in Chancery to be directed to "Robert Lord Henby," &c., whereas it was to "Sir Robert Henby, Knt.," &c.; *Rex v. Lookup*, 1 T. R. 240. On an indictment for perjury, alleged to have been committed by the defendant, as a witness in a civil action, it appeared that the evidence given on that trial by the defendant, contained all the matter charged as perjury, but other statements not varying the sense intervened between the matter set out; held to be no variance, although in the indictment the evidence appeared to have been given continuously; *Rex v. Solomons* 1 R. & M. 252. So, it was no variance where an indictment for perjury stating that an action was depending between H. H. and B. F., and when the judgment was produced it stated that B. F. sued by the name of S. F. was attached to answer H. H., &c.; *Rex v. Windus*, 1 Campb. 406. But it was held a fatal variance where an indictment for perjury in a written deposition before a magistrate, in which a word necessary to the sense had been omitted, in setting out the substance and effect of the deposition, supplied a word according with the sense, as if it had actually stood in the deposition; *Rex v. Taylor*, 1 Campb. 404.

If an indictment state that an issue was joined at the "General Sessions" of our Lord the King, holden for the county of G., before his Majesty's Justices of the Court of Great Sessions, this will not be proved by showing that such an issue was joined at the Great Sessions of that county; and if it is laid that the issue was joined in an ejectment, in which John Doe, on the demise of W. R. and D. T., was the plaintiff on the joint demise, and also in two several demises of the same lessors, this will be a fatal variance, as this is a description of how he was plaintiff, and not an allegation only; *Rex v. Thomas*, 1 C. & P. 472. Where the indictment alleged that the cause was tried at the assizes, before E. W., one of the judges, &c., and it was stated in the Nisi Prius record, in the usual form, that the cause was tried before the then two judges of assize, one of whom was E. W.; held to be no variance; *Rex v. Alford*, 14 East, 218. An indictment for perjury in setting out the record of a conviction at the Middlesex Sessions stated an adjournment to have been made by F. Const, Esq., and A. B. C. D. and others, their fellows, &c. justices; an examined copy of the record of conviction, when produced, stated the adjournment to have been made by F. Const, Esq., and E. F. G. and others, &c.: held that this defect might be cured by parol evidence of an adjournment made by the person named in the indictment, but that no such evidence being given, the variance was fatal; *Rex v. Bellamy*, 1 R. & M. 171. But where an indictment for perjury, assigned on evidence given in the Palace Court, described the court as "the Court of the King's Palacé at Westminster," and it appeared from the record of the trial below that it was called "the Court of the King's Palace of Westminster;" held to be no variance; *Rex v. Israel*, 3 D. & R. 234; and see *Pippet v. Hearn*, 1 D. & R. 266; S. C. 5 B. & A. 634. The word "commission," according to the context of the sentence in which it is used, may mean either the instrument by which authority is given to "commissioners," or the persons to whom the authority is given; therefore where, in an indictment for perjury assigned on a petition to the Lord Chancellor to supersede the commission of bankrupt, the indictment professing to set forth only the substance of the petition stated, "that, at the several meetings before the commission, the petitioner declared openly, and in the presence and hearing of A. B., as assignee, so and so," and it appearing from the petition itself that the allegation therein was, "that, at the several meetings before the commissioners, the petitioner declared so and so;" held that this was not a fatal variance; *Rex v. Dudman*, 7 D. & R. 324. It is no variance in an indictment to state that a bill was directed to Messrs. A. B. and Co. with-

II. RELATIVE TO PAROL EVIDENCE.\* See *ante*, div. I. (A) a. [ 290 ]

out the r, instead of Messrs. A. B. and Co. with it; *Rex v. Oldfield*, Bayl. Bills. 310. Where a bill of exchange was addressed to, and purported to be accepted by, Messrs. "W. and Co. Bankers, Birch-in-lane," and in the corner at the foot of the address to them, the figure "3" was written in a small character, but it was not proved to have been on the bill at the time of its being uttered or dishonoured; on an indictment for forgery, professing to set out the bill in terms, the figure "3" was inserted as it appeared on the bill when it was produced at the trial; *quære* whether this was a variance; *Rex v. Watts*, 6 Moore, 442; S. C. 9 Price, 620.

Where, in an indictment on an answer, a bill was described as having been exhibited against three persons only, and on the production of the bill it appeared to be against four; held to be no variance; *Rex v. Powell*, 1 R. & M. 101. An indictment for stealing "a brass furnace" in the county of Hereford, is not supported by evidence of stealing a brass furnace in the county of Radnor, and breaking it there, and bringing the fragments into Herefordshire, as the prisoner had merely certain pieces of brass in that county; *Rex v. Holloway*, 1 C. & P. 127. So, an indictment for stealing two turkeys is not supported by proof of stealing two dead turkeys. Where an indictment on 30 Geo. 2. c. 24. avers that the defendant under false pretences obtained a sum of money, the property of A., and it appeared in evidence that the money was obtained from B., acting as A.'s servant, who had not then in his possession any money belonging to A., but afterwards was repaid by him the sum delivered to the defendant, the variance is fatal, *Rex v. Douglass*, 1 Campb. 213. unless B. had at the time in his possession a sum belonging to A., equal to that delivered to the defendant.

Where an indictment on the 17 Geo. 3. c. 26. s. 7. averred that a sum of money was taken for soliciting, procuring, &c. an annuity, for which an entire sum was taken, held that proof that part of the sum was taken for the deeds was no variance; *Rex v. Gillham*, 6 T. R. 265; S. C. 1 Esp. 285. A recital that an issue came on to be tried is supported by evidence that an information containing several counts, to each of which the general issue was pleaded, was so tried; *Rex v. Jones*, Peake, 38. Where, to an information in the Exchequer, for having goods, knowing them to have been run, the defendant pleads not guilty, such plea only puts in issue the fact of the defendant's possession and knowledge; and if, in stating the record, it is said that the issue was touching and concerning the forfeiture of the goods, it is a fatal variance; *Rex v. Hawkins*, Peake, 8.

An indictment for not repairing a road must describe a direct road; *Rex v. Great Canfield*, 6 Esp. 136. It is no variance in an indictment for perjury which sets out an indictment for an assault, which had the words "whereby his life was greatly despaired of," that the former omitted the word "despaired;" *Rex v. May*, 1 Dougl. 183; S. C. 1 T. R. 237. It is not a fatal variance, after verdict, where an information, professing to set out the title of an act of parliament, described it as entitled an act, &c. for repealing duties on salt, and the drawbacks, &c. *thereon*, the title being, in fact, in the same words, with the exception of having the word *thereout* instead of *thereon*, and adding, "and for granting other duties, &c. *thereon*," the concluding word being the same; *Attorney General v. Horton*, 4 Price, 237. Where in a criminal information it was stated that an order had been made to land goods at the quay or wharf appointed by law, that averment was held not to be supported by proving an order to land them at the king's warehouses, though they stand on the wharf or quay; *Rex v. Cassano*, 5 Esp. 231. The evidence in a convic-

\* It may be advisable here to state that, in all cases where the cause of action is to be substantiated by parol evidence, the facts averred, or part of them, must be proved as laid, so as to constitute a sufficient cause of action; *Tempest v. Chambers*, 1 Stark. 67.

## [ 291 ] Vendor and Purchaser.

## I. OF ESTATES.

FIRST. OF THE PARTIES BETWEEN WHOM THE RELATIVE SITUATION OF VENDOR AND PURCHASER MAY BE CREATED.

Agents. See tit. Principal and Agent. Aliens. See tit. Alien. Assignee. See tits. Bankrupt; Bond; Covenant; Deed; Insolvent Debtors; Lease; Remainder; Reversion. Auctioneers. See tits. Auction and Auctioneer. Bankrupt. See tit. Bankrupt. Brokers. See Principal and Agent. Churchwarden. See tits. Churchwardens. Clergymen. See tit. Ecclesiastical Persons. Commissioners. See tits. Bankrupt; Excise and Customs; Inclosure, Insolvent Debtors; Lunatic. Drunkard. See tit. Intoxication. Duress, Persons under. See tit. Duress. Executors and Administrators. See tit. Executor and Administrator. Feme Covert. See tit. Baron and Feme. Gamblers. See tit. Gaming. Government Agents. See tit. Government Contracts. Husband and Wife. See tit. Baron and Feme. Idiots. See tit. Idiots. Infants. See tit. Infants. Lunatic. See tit. Lunatics. Married Women. See tit. Baron and Feme. Outlaws. See tit. Outlawry. Overseers. See tit. Overseers. Partners. See tits. Partners and Partnership. Smugglers. See tit. Smuggling. Stockbrokers. See tit. Stockjobbing. Trustees. See tit. Trustees.

SECOND. OF THE MODE OF CREATING THE RELATIVE SITUATIONS OF VENDOR AND PURCHASER.

See tits. Auction and Auctioneer, Contract, Covenant, Executor and Administrator, Fixtures, Fraud, Statute of, Grant, Lease, Mortgage, Sheriff.

THIRD. OF THE CONSIDERATION REQUISITE TO CREATE THE RELATIVE SITUATION OF VENDOR AND PURCHASER.

(A) OF THE ORIGINAL SUFFICIENCY OF THE CONSIDERATION, p. 294.

(B) ——— FAILURE OF THE CONSIDERATION, p. 295.

## [ 292 ] FOURTH. OF THE EFFECT OF THE RELATIVE SITUATION OF VENDOR AND PURCHASER BEING CREATED.

(A) AS REGARDS THE VENDOR.

1st. Of his rights.

(a) To compel a specific performance of the contract in equity, p. 296. (b) To an action at law for non-performance of the contract, p. 300. (c) To interest on purchase money, p. 304. (d) To lien on the estate for purchase money, p. 304.

2nd. Of his liabilities.

(a) On his covenant for title. See ante tit. Covenant. (b) On his covenant for quiet enjoyment. See ante, tit. Covenant. (c) On his covenant for further assurance. See ante, tit. Covenant. (d) To a bill for a specific performance, p. 297. (e) To an action at law for damages. See post, div. B.

(B) AS REGARDS THE PURCHASER.

1st. Of his rights.

tion stated, that the Coburg Theatre was in the parish of Lambeth, and the adjudication of the penalty was to the poor of the parish of St. Mary, Lambeth; held, that this was no variance, it not appearing that there were two distinct parishes so named; *Rex v. Glossop*, 4 B. & A. 616. Where an inquisition found that the crown debtor was indebted in a sum certain for duties, &c., due between two given periods, and on the trial of a traverse of the crown's debt, *modo et forma*, it was proved that the debtor was indebted at the time of the inquisition in a different sum for duties accruing for a different period, it is not a fatal variance, because the allegation of the amount of the debt, and of the period for which it was due, is not of the substance of the issue, and may be rejected as surplusage; it is enough if there was any debt in fact due to the crown at the time of taking the inquisition, to sustain the proceedings, for the being indebted to the crown is the basis of the extent; *Rex v. Franklin*, 5 Price, 614.

(a) Entitled to the estate in equity from tenor of the contract, p. 305. (b) To enforce specific performance. See ante, div. A. (c) To action against vendor for not completing contract.

1. On the special contract, p. 306.

2. To recover the deposit, p. 307.

(d) To what title to the estate he may insist on, p. 308. (e) To have an abstract, p. 309. (f) To an assignment of outstanding terms, p. 310. (g) To attested copies of deeds, p. 310. (h) To a covenant for title, p. 310. (i) To be protected from fraudulent or voluntary conveyances. See post, tit. Voluntary Conveyance. (j) To be protected from acts of bankruptcy. See ante, tit. Bankrupt. (k) To be protected from judgments or recognizances. [ 293 ] See ante, tit. Judgments. (l) To be protected from unregistered deeds. See ante, tit. Deed.

2d. Of his duties and liabilities.

(a) To search for incumbrances, p. 310. (b) Liability to incumbrances, p. 311. (c) To see to the application of the purchase money, p. 312. (d) To pay interest on purchaser's money, p. 304. (e) To bill for specific performance, p. 296. (f) To action at law for damages, p. 300.

## II. OF PERSONAL CHATTELS, p. 313.

FIRST. OF THE PARTIES BETWEEN WHOM THE RELATIVE SITUATION OF VENDOR AND PURCHASER MAY BE CREATED, See ante, div. 1.

SECOND. OF THE MODE OF CREATING THE RELATIVE SITUATIONS OF VENDOR AND PURCHASER. See tits.—

Auction and Auctioneer, Contract, Covenant, Executors and Administrators, Fixtures, Frauds, Statute of, Grant, Lease, Mortgage, Sheriff.

THIRD. OF THE CONSIDERATION REQUISITE TO CREATE THE RELATIVE SITUATIONS OF VENDOR AND PURCHASER, p. 315.

FOURTH. OF THE MODE IN WHICH A CONTRACT OF SALE IS CONSTRUED, p. 315.

FIFTH. OF THE EFFECT OF THE RELATIVE SITUATION OF VENDOR AND PURCHASER BEING CREATED.

(A) AS REGARDS THE VENDOR.

FIRST. OF HIS RIGHTS.

(a) Of his lien on the goods for the price, p. 316. (b) Of right to stop them in transitu. See ante, tit. Stoppage in Transitu. (c) To compel a specific performance of contract of sale, p. 316. (d) To action at law for non-performance of contract, p. 317. [ 294 ]

SECOND. OF HIS LIABILITIES.

(a) On his express or implied warranty of title. See post tit. Warranty. (b) To a bill for a specific performance, p. 296. (c) To an action at law for damages. See post, div. B. c.

(B) AS REGARDS THE PURCHASER.

FIRST. OF HIS RIGHTS.

(a) To the possession of the goods in general, or when sold on contract of sale or return, p. 323. (b) To enforce specific performance of the contract, p. 296. (c) To action against vendor for not completing the contract, p. 324. (d) To be protected from fraudulent or voluntary conveyances. See post, tit. Voluntary Conveyances. (e) To be protected from acts of bankruptcy. See ante, tit. Bankrupts. (f) To be protected from judgments or recognizances. See ante, tit. Judgment. (g) To be protected from execution. See ante, tit. Fieri Facias.

## I. OF ESTATES.\*

\* On the subject of vendors and purchasers of estates see Sir E. C. B. Sugden's invaluable publication; a work in which the rules applicable to this complicated and important branch of jurisprudence are collected, arranged, and discussed in a manner to create a wish in every reader that many other divisions of the law of England had been selected by him for exposition and comment. The rules and cases included under this head of the abridgement are necessarily confined to the common law principle and decisions, with the exception of a few references to equity decrees in the notes.

THIRD. OF THE CONSIDERATION REQUISITE TO CREATE THE RELATIVE SITUATION OF VENDOR AND PURCHASER.

(A) OF THE ORIGINAL SUFFICIENCY OF THE CONSIDERATION.\*

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(B) OF THE FAILURE OF THE CONSIDERATION.†

\* In the absence of fraud, gross misrepresentation, or an industrious concealment of defects in an estate, a court of equity will compel the performance of a contract of sale, however inadequate the consideration; 2 Vern. 241; 2 Bro. Pl. 396; 3 Atk. 383; particularly where the estate is sold by auction, 7 Ves. 30; 3 Bro. C. C. 228. Still few contracts can be enforced in equity where the price is unreasonable, because contracts are not often strictly observed by either party; and if an unreasonable contract be not performed by the vendor, according to the letter in every respect, equity will not compel a performance in specie by the purchaser; see the cases cited in n. (a.) *Sagden's V. and P.*; and *Edwards v. Heather*, Sel. Cha. Ca. 2. And a conveyance executed will not be easily set aside on account of the inadequacy of the consideration; for there is a great difference between establishing and rescinding an agreement. To set aside a conveyance, there must be an equality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it; per Lord Thurlow in *Gynne v. Heaton*, 1 Bro. C. C. 1: and see *Stephens v. Bateman*, Bro. C. C. 22; *Floyer v. Sherard*, Amb. 18; *Heathcote v. Paignton*, 2 Bro. C. C. 167, and the cases there cited, *Spratley v. Griffiths*, 2 Bro. C. C. 179. n.; *Low v. Barchard*, 9 Ves. jun. 133; *Underhill v. Horwood*, 10 Ves. jun. 209. But a conveyance obtained for an inadequate consideration from one not conscious of his right, by a person who had notice of such right will be set aside, although no actual fraud or imposition is proved, *Evans v. Llwellyn*, 2 Bro. C. C. 150; and the cases cited in the next note. So, if advantage is taken of the distress of the vendor, the sale will be set aside; *Herne v. Meeres*, 1 Vern. 465; 1 Bro. C. C. 176. n.; *Gould v. Okenden*, 4 Bro. C. C. by Toml. 193; *Ferguson v. Maitland*, Gro. and Rad. of Law and Eq. p. 89. Pl. 1; *Sagden's V. and P.* In treating of inadequacy of price, we must be careful to distinguish the cases of reversionary interests, the rules respecting which, especially where an heir is the vendor, depend upon principles applicable only to themselves, and not easily definable; 9 Ves. jun. 246; 2 Pow. contra, 181; 3 Wooddes. 460. s. 7; *Gilb. Lex Pætor*, 291; 1 *Trea. Eq. c. 11. s. 12*; and Mr. Fonblanque's notes, *Ibid.* The heir of a family dealing for an expectancy in that family, shall be distinguished from ordinary cases, and an unconscionable bargain made with him shall not only be looked upon as oppressive in the particular instance, and therefore avoided, but as pernicious in principle, and therefore repressed; per Lord Thurlow, 1 Bro. C. C. 10: *Nott v. Hill*, 1 Vern. 14; *Earl of Ardglass v. Muschamp*, 1 Vern. 237; *Twisleton v. Griffith*, 1 P. Wms. 810; *Carwyn v. Milner*, 3 P. Wms. 293. n. (c); *Sir John Barnardiston v. Lingood*, 2 Atk. 133; *Baugh v. Price*, 1 Wils. 320; *Gwynne v. Heaton*, 1 Bro. C. C. 1. But a *bona fide* sale of reversionary estate cannot be set aside, whether the vendor be an heir or not, *Dew's v. Brandt*, Sel. Cha. Ca. 8; and see 1 Bro. C. C. 6; unless fraud or imposition be expressly proved, or be implied from the inadequacy of the consideration, or other circumstances attending the sale; *Nichols v. Gould*, 2 Ves. 422; *Gwynne v. Heaton*, 1 Bro. C. C. 1. And if the bill be delayed for a length of time, *Moth v. Atwood*, 5 Ves. jun. 845; or the vendor, with full notice of all the circumstances, and of his right to set aside the contract, confirm the purchase; *Cole v. Gibbons*, 3 P. Wms. 290, *Chesterfield v. Janson*, 1 Atk. 301; 2 Ves. 649; *Bough v. Price*, 1 Wils. 320; *Morse v. Royal*, 12 Ves. jun. 355, equity will not relieve against the sale, although the aid of the Court could not have been originally withheld. If it be agreed that the price of an estate shall be fixed by a third person, and such person accordingly name the sum to be paid for the estate, equity will compel a performance in specie; but if the referees do not act fairly, or the valuation be not carefully made, execution of the contract will not be compelled, especially if there be any other ground upon which the Court can fasten as a bar to its aid; *Emery v. Wise*, 5 Ves. jun. 346; 8 Ves. jun. 505; *Hall v. Warren*, 9 Ves. jun. 605.

† A vendee being equitable owner of the estate from the time of the contract for sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand he will be entitled to any benefit which may accrue to the estate in the interim; 2 Pow. on Contract, 61; 2 P. Wms. 220; 1 Id. 62; 2 Vern. 280; 1 Bro. C. C. 157. n.; 6 Ves. jun. 349. It equally follows from this general rule that, if a person agree to give a contingent consideration for an estate, as an annuity for the life of the vendor, and the vendor die before the consideration is executed, by which event the annuity ceases, yet the purchaser will be entitled to a specific performance of his contract. In this case if performance of the agreement were not compelled the parties would stand in precisely the same situation as before the contract; while, by performing the agreement, the estate is given to the purchaser without his paying any consideration for it. A steady adherence to principle compels the Court to overlook the hardship of this particular case; and the doctrine rests upon high authority; 1 Bro. C. C. 156; 3 Id. 609; 9 Ves. jun. 246.

## FOURTH. OF THE EFFECT OF THE RELATIVE SITUATION OF VENDOR AND PURCHASER BEING CREATED.\* [ 296 ]

## -(A) AS REGARDS THE VENDOR.

## FIRST. OF HIS RIGHTS.

## (a) To compel a specific performance of the contract in equity.†

\* It has been before stated that courts of equity, with respect to agreements for the disposition of property, make the remarkable distinction, that what is effectually contracted to be done, is to be considered as done, 1 P. Wms. 713; 3 P. Wms. 216; 1 Atk. 572; 3 Atk. 534; 1 Ves. 494; 13 Ves. 472; and thereupon hold that such contracts are for the most part, equivalent in equity to actual conveyances in law; 1 Ves. 220; 1 P. Wms. 62. 176; 3 Atk. 256; 2 Ves. 633. Thus, for example, upon an agreement for the sale of real estate, although for want of the legal formalities it cannot be adjudged to be actually transferred, the vendor as between him and the vendee, 3 Atk. 273. is from the time of the contract regarded in equity as a trustee, therefore, for the purchaser, and the latter from the same period a trustee of the purchase money for the former; 1 Atk. 573; 3 Atk. 273; 13 Ves. 472; 1 Madd. R. 538. The purchaser might enter into a sub-contract for the disposition of his equitable interest therein, 6 Ves. 352; 1 Swanst. 55; *Baxter v. Conolly*, 1 Jac. and W. 576; and, upon such an agreement to sell the same, would become a trustee therefore for the person with whom he should so contract, who would thereby acquire a right to the performance thereof, and to call on the original vendor, indemnifying him against all costs and charges for the use of his name, to enable his vendee to execute the sub-contract; 1 Swanst. 56. A purchaser before the actual conveyances to him are executed may also devise his equitable interest in the property, *Potter v. Potter*, 1 Ves. 437; 9 Ves. 510; 10 Ves. 611. 614; and if the estate be of inheritance, and he die without having made such a disposition, the same will descend to his heir; 1 Ves. 494; 7 Ves. 274; 10 Ves. 611. 614. And this doctrine it seems, is applicable to copyhold, as well as freehold estates, *Hinton v. Hinton*, 2 Ves. 681; S. C. *Amb. 277*; and see *Davis v. Beardham*, 1 Ca. in Ch. 30; *Greenhill v. Greenhill*, 2 Vern. 679; S. C. Pr. Ch. 321; on the other hand, the vendor is, in equity, the owner of the purchase money, which is there regarded as part of his personal estate, which he may dispose of as such during his life, and which if he should not do so will go to his personal relatives; *Babb's case*, 2 Freem. 38; 7 Ves. 345; 1 Madd. R. 538; and see *Carter v. Carter*, Ca. Temp. Talb. 271. With respect to the actual enjoyments, if by the contract any specific time may be fixed therein for the completion, the vendee is entitled to the rents, and the vendor to the interest upon his purchase money from that period, 6 Ves. 352; *Burnell v. Brown*, 1 Jac. and W. 168; 6 Madd. 257; or, if it be general, they are so respectively entitled from the time when the purchase money is completed; 10 Ves. 613; *Acland v. Gaisford*, 2 Madd. R. 28. But as to the possession, there is no change in the notion of equity until the purchase money is actually paid; 2 Madd. R. 32; and see case of *Mackerel v. Hunt*, 2 Madd. R. 34. n.; *Winter v. Lord Anson*, 1 Sim. and Stu. 434; *Ib. 444*. The accuracy of these observations of course depends upon the contract being ultimately carried into execution; for if it should not be completed, equity would not ratify and give effect to such interpretation; 1 Ves. 220; 1 Atk. 573; 2 R. Wms. 220; *Paine v. Meller*, 6 Ves. 349. 10 Ves. 613. 621; *Gaskarth v. Lord Lowther*, 12 Ves. 107; 13 Ves. 477; 1 Madd. R. 538; 6 Madd. 257. It is to be observed, however, that the effect of this construction where it avails is that, if any circumstance occur after the time for completion of the contract to increase or depreciate the value of the property sold, 1 Madd. R. 539; or for the consideration of the same, the gain or loss will attach to the person to whom, in equity the same belongs, so that if the value of the property should become accidentally improved after the period alluded to the gain would accrue to the purchaser, 1 P. Wms. 62; ex parte *Manning*, 2 P. Wms. 410; 1 Madd. R. 539; or if it should so become diminished, the loss would fall upon him, *White v. Nutt*, P. Wms. 61; *Paine v. Meller*, 6 Ves. 349; ex parte *Minor*, 11 Ves. 559; and see *Cass v. Rudell*, 2 Vern. 289; but see S. C. mentioned 1 Bro. C. C. 157. n.; *Hartford v. Parrier*, 1 Madd. R. 532; unless the actual completion of the contract should have been unnecessary and without acquiescence, *Seaton v. Slade*, 7 Ves. 265; *delayed Foster v. Deacon*; 3 Madd. 394; in the former instance, on the part of the purchaser, *Spurrier v. Hancock*, 4 Ves. 667; in the latter on the part of the vendor, 1 P. Wms. 62; 1 Madd. R. 540; the validity of the contract, however depends on the circumstances at the time when it was made; 1 Atk. 404; 16 Ves. 156. It remains to be noticed that, after such an agreement has been entered into, the implied trust descends with the property, and the heir of the vendor is bound by the agreement to the execution of a conveyance accordingly, *Gall v. Vermaden*, 2 Freem. 199; S. C. 2 Eq. Ca. Ab. 54; and the personal representatives of the purchaser to the payment of the purchase money out of his assets; 10 Ves. 611. And with regard to the persons who are respectively entitled in such case to a conveyance, and to the purchase money, the question is to be determined upon the equitable construction

† We have before had occasion to notice briefly the general rules as to Courts of equity entertaining suits to compel a specific performance, see ante tit. Specific Performance.

just alluded to; 7 Ves. 345. 10 Ves. 607. And if the agreement were so binding upon the parties that the performance of it would have been decreed, 10 Ves. 607. at the time of the death of the vendor, his personal representative would be entitled to the purchase money, and to call upon his real representative to convey the estate; *Lacon v. Mortins*, 3 Atk. 1. And under similar circumstances, upon the death of the purchaser, his heir, *Buckmaster v. Harrop*, 7 Ves. 341; S. C. 13 Ves. 456, and see *Langford v. Pitt*, 2 P. Wms. 629; or devisee, *Potter v. Potter*, 1 Ves. 437; 10 Ves. 611; would be justified in demanding a conveyance from the vendor, and in calling upon the personal representative of the purchaser to pay the purchase money; but it must be observed that, although these propositions are *prima facie* true, they are subject to variation, 10 Ves. 608; according to the relative equities of the parties interested respectively in the real or personal property of the deceased; *Sugden, V. & P.*

The following observations will be confined to enforcing the fulfilment of agreements between vendor and purchaser. The Court of Chancery, it seems, originally regulated its decision as to compelling the specific performance of contracts of sale implicitly, upon the authority of the courts of law, that it was the practice to send the parties thither in the first instance, to ascertain whether the plaintiff in equity had the legal right, and according to the verdict to extend or withhold its more specific remedy, *Ambl. 406*; *Wiseman v. Roper*, 1 Cha. Rep. 158; 2 Freem. 217; *Hollis v. Edwards*, 1 Vern. 159; 11 Ves. 592; in the course of time, however, this perception as a general rule, even where a remedy in the shape of damages might be sought at law, became unnecessary; and indeed, such has long been the high judicial authority and discretion of this court, that there have now been many instances of this kind in which it has interfered, where damages would not have been given; 2 Freem. 246; *Cannel v. Buckle*, 2 P. Wms. 243; *Acton v. Pearce*, 2 Vern. 480; 1 Ves. 258; 2 Sch. and Lefr. 347. 684. It was also decreed a specific performance where an action at law has been lost by the default of the party seeking such relief, if it be notwithstanding conscientious, that the same should be carried into effect, 2 Sch. and Lefr. 347; and where an action will not lie between the parties, if the right be clear to the satisfaction of this court, as if A. should contract with B., and B. should afterwards contract with C. for the same matter; for although A. could not sustain an action against C. at law, he might in this court compel fulfilment by him of the agreement; 3 Meriv. 486. Besides, however, its being necessary that the Court should be satisfied of the plaintiff's right, it must also appear that the legal remedy, if it can be obtained, would be inadequate 8 Ves. 163; *Andlin v. Rutter*, 1 P. Wms. 570; *Buxton v. Lister*, 3 Atk. 383; *Fliat v. Brandon*, 8 Ves. 159; *Davis v. Hone*, 2 Sch. & Lefr. 341; *Ibid. 353*; in some instances that remedy may be more appropriate than any this court can afford. 8 Ves. 163; and therefore it must be assured, that under all the circumstances it is equitable to give more relief than the applicant can obtain at law; 6 Ves. 338; 10 Ves. 305; 1 Jac. and W. 351. it is where the plaintiff to have full justice, requires that the contract should be specifically performed, 2 Bro. C. C. 343; and where a breach of it would be productive of irreparable injury, 1 Jac. and W. 370. that this court so interferes if it would be equitable by reason of extrinsic circumstances, such as accident, mistake or fraud: it would not grant a specific performance; *Young v. Clerck*, Prec. Cha. 541; *Twining v. Morrice*, 2 Bro. C. C. 326; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. and Bea. 524; *Cadman v. Horner*, 18 Ves. 10; *Wall v. Stubbs*, 1 Madd. R. 80; *Rhodes v. Cook*, 2 Sim. and Stu. 488. And it may be observed that a Court of equity for the most part gives this peculiar relief in cases in which the question arises in respect of realty, and not where it relates to personality; but that it does not so regulate its interference upon the distinction between the two descriptions of property.

It decrees performance of a contract for land, not on account of the real nature thereof, but because damages at law, which must be calculated upon the general money value of the land, may not be a complete remedy to the purchaser to whom the estate may have a peculiar and special value. So, it will generally refuse to decree performance of a contract for the sale of stock or goods, not on account of their personal nature, but because damages at law calculated upon the market price of the stock or goods are as complete a remedy to the purchaser as the delivery of the stock of goods contracted for, inasmuch as with the damages he may purchase the same quantity of the like stock or goods; 1 Sim. & Stu. 610. But a contract for the sale of personality may nevertheless be of such a character, that the subject matter bearing the purchaser, either intrinsically or from some attendant circumstances, a peculiar value, the non-fulfilment of it will not admit of a pecuniary compensation; and in such a case, therefore, this court will hold a specific performance as essential to justice as if the agreement related to realty, and will decree accordingly; *Buxton v. Lister*, 3 Atk. 383; *Taylor v. Neville*, cited *Ib. 384*; *Bull v. Cogges*, 1 Bro. P. C. 140; *Withy v. Cottle*, 1 Sim. & Stu. 174; *Lingen v. Simpson*, 1 Sim. & Stu. 600; *Adderley v. Dixon*, 1 Sim. & Stu. 607.

It would appear that this Court will not carry into execution a contract different from that stated by the plaintiff, or if he should have been guilty of laches, or if, being a vendor, he should be unable to show his title to the property. But there are instances in which defects



on these grounds might seem to be imputable; in which, nevertheless, from extrinsic circumstances it appears that this Court would exercise its authority in furtherance of the principles of equity, by administering relief rather than by adhering strictly to general rules. A more convenient opportunity will hereafter occur, for considering the instances in which this Court declares in rules with reference to contracts obtained by fraud; and many cases suggest themselves under the present head, illustrative of the manner wherein accident, which from its very nature must, if at all, be proved by parol evidence, may effect the general principles of this Court with regard to the execution of agreement. And is necessary here to remind the reader that, although such testimony shall not vary an agreement, it is nevertheless allowed to show circumstances of fraud, making it unconscientious in the party who so obtained it to insist upon, and unjust in the Court to decree specific performance thereof; and that such proof will also be admitted of mistake or surprise; 1 Ves. & B. 527; and see *Joynes v. Statham*, 3 Atk. 387; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; 10 Ves. 305; *Mason v. Armitage*, 13 Ves. 25; 13 Ves. 135; *Ramsbottom v. Gosdon*, 1 Ves. & B. 165; *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 524; *Howell v. George*, 1 Madd. R. 1; *Lord W. Gordon v. Marquis of Hertford*, 1 Madd. R. 106; *Flood v. Finlay*, 2 B. & B. 15; *Garrard v. Grinling*, 2 Swanst. 224. And it is here to be remarked, that such doctrine is not at variance with the Statute of Frauds; for it is not thereby enacted that a written agreement shall in all cases be binding, but only that in certain instances an unwritten agreement shall not bind; 1 Sch. & Lef. 39; 2 Madd. R. 120. And although, if any of the collateral circumstances which attended it, and afford ground for impeaching the same, should be reduced into writing, the rule would apply to them; such circumstances require not that kind of evidence; for, being dehors the agreement, they do not vary it, but admitting the truth thereof, show that it ought not to bind the party; and the same may therefore be proved by parol; 1 Cox. R. 405. The extent, however, to which this Court will apply its rule of refusing relief, upon the ground of mistake so proved, is, as already intimated, the subject to which our attention is here drawn. It would be extremely inconvenient if such proof were, in every instance, to prevent this Court from decreeing performance of a contract; and, therefore, it is laid down that, where there are small inaccuracies which are capable of compensation, although it would decree a specific performance, it would take care, however, that substantial justice should be done between the parties; 10 Ves. 306; 1 Madd. R. 166; and see *Guest v. Hemfray*, 5 Ves. 818. And this is not in derogation of the rules of the courts of law, but rather in prevention of their forms being made instruments of injustice; inasmuch as if it were to confine its extraordinary relief to cases of strict legal title, it would enable parties to avail themselves of the rigid rules of law for unconscientious purposes; 13 Ves. 77. If, therefore, advantage be attempted to be taken of an unimportant circumstance, to avoid performance of a contract, it will interfere: thus, for instance, if an agreement should be entered into for the sale of a term of ninety-eight or ninety-seven years therein, although he would be nonsuited in an action, this Court would give him a specific performance of the contract, with compensation to the purchaser for the defect, *Idid.*; and upon the same principle, *small*, 19 Ves. 221. *outgoings*, *Holland v. Norris*, 1 Cox. R. 59; *Esdale v. Stephenson*, 1 Sim. & Stu. 122. or encumbrances, *Guest v. Homfray*, 5 Ves. 818; *Halsey v. Grant*, 13 Ves. 73; *Horniblow v. Shirley*, 3 Ves. 81. would form no objection to such relief being afforded. Where, in the case of a sale, all the property was described as a freehold, but a small portion of it turned out to be held merely at will, the purchaser was decreed to fulfil his agreement, and compensation was directed to be made to him in respect of that part of the property held by such inferior tenure; *Calcraft v. Roebuck*, 1 Ves. jun. 221. And it is here worthy of notice, that this Court has compelled specific performance where there were small encumbrances, upon an indemnity against them being given to the purchaser by the vendor, *Horniblow v. Shirley*, 13 Ves. 81; and *Halsey v. Grant*. *Ibid.* 73; but it has since been declared, that although this Court can give compensation, *Guest v. Homfray*, 5 Ves. 818. it cannot compel a purchaser to take an indemnity; *Bulmanno v. Lumley*, 1 Ves. & B. 224.

It seems that where there is any mistake in the description of the quantity or extent of the property, or in the definition of the quality, or of the degree of interest in it, or where there is any defect in the title to part of the same, there is a considerable difference as to the decree of this Court, whether it is the vendor who seeks to compel the purchaser to accept part of what he contracted for, with adequate compensation in respect of the rest, or whether the latter calls upon the former to complete his contracts as far as he is able, or whether the Court is very strict in regarding the substance of the transaction, whilst in the other it is more liberal, and will allow the purchaser to take almost what he pleases, so long as the value of the rest can be ascertained. The truth of this observation is collected from the general tenor of the cases on this subject, rather than from any specific authority; see, however; 10 Ves. 315, 316; 1 Swanst. 54; *Milligan v. Cooke*, 16 Ves. 1; 3 Ves. & B. 192; 2 B. & B. 64; but it is to be observed that, even where the application is by the vendor, an objection of the nature here alluded to may have been waived by the defendant, proceeding after knowledge of the defect towards the completion of his contract; but if compensation can be given, it seems he will still be entitled thereto; *Calcraft v. Roebuck*, 1 Ves. jun. 221. *Fordyce v. Ford*, 1 Bro. C. C. 494; *Dyer v. Hargrave*, 10 Ves. 505; *Burnell v. Brown*, 1

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The plaintiff, in order to sustain an action against a purchaser, must be prepared to show that he has per-

(b) *To an action at law for non-performance of the contract.\**

1. GLAYEBROOK v. WOODROW. M. T. 1799. 8 T. R. 366.

The plaintiff covenanted to sell to the defendant a school-house, &c., and to convey the same to him on or before the 1st of August, 1797, and to deliver

Jac. & W. 468; Heaphy v. Hill, 2 Sim. & Stu. 29; Morris v. Clarkson, 3 Swanst. 558; in which the Court refused to impound a part of the purchase money for the purpose of indemnifying the vendee against the consequences of a defect in the title. According to the strict interpretation adopted in the courts of law, every proper term of a contract should, in carrying it into effect, be accurately attended to; and particularly, the times therein limited for the performance of subsidiary acts should be punctually observed. It is a general rule in this Court, that it will nevertheless interfere after the time of completion of the contract has elapsed, if the defendant will substantially have that for which he contracted, 13 Ves. 228. and his object in entering into it will not be defeated; Crofton v. Ormsby, 2 Sch. & Lefr. 604. It seems however to be established, that in certain cases, by agreement of the parties, time may be made of the essence of the contract, 3 Meriv. 84; 1 Jac. & W. 420; 3 Madd. 447. 6 Madd. 26; and in case it must be observed as strictly as at law; and that in others it necessarily is so from the nature of the subject matter of the bargain; 1 Turn. R. 79; Coslake v. Till, 1 Russ. R. 376. Thus upon the sale of a reversion, in which case it may be inferred that the vendor is in want of the consideration money, and to whom therefore it is of importance that the principal should be paid at the time appointed, Newman v. Rogers, 4 Bro. C. C. 391; and see Lord Ormond v. Anderson, 2 Ball. & Bea. 370; or where the value of the property is peculiarly liable to fluctuation, as national stock, Forrest v. Elwes, 4 Ves. 492; Doloret v. Rothschild, 1 Sim. & Stu. 590; or where the agreement is to sell a valuation, to be made by individuals named within a certain period, Morse v. Morest, 6 Madd. 26; time is of the essence of the contract. But the benefit of the general doctrine may be waived by the conduct of the party entitled thereto, Hudson v. Bartrum, 3 Madd. R. 440; for this Court will not permit its own rules to be instrumental to injustice; and therefore will not allow a party who has laid by with the view of determining whether the bargain would be ultimately advantageous or otherwise, to abandon it, or to claim a specific performance according to his caprice; Alley v. Deschamps, 13 Ves. 226; and Ibid. 228; Phillips v. Lord Kensington, 5 Dow. P. C. 61; Pritchard v. Ovey, 1 Jac. & W. 396. And here it is observable that the question, whether time was originally of the essence of the contract, and whether, if it were, it continued so to be, are questions depending on evidence; Levy v. Lindo, 3 Meriv. 81.

If there be a period limited in an agreement for the performance of any specified or subsidiary act, but not so expressly as to render it imperative that the same should be strictly observed, and the nature of the subject matter should not require that construction, and in consequence of inevitable accident, 4 Ves. 690. note, or any other of the circumstances which usually obtain the favour of this Court, should pass by without its fulfilment, a specific execution of the contract would nevertheless be decreed; Radcliffe v. Warrington, 12 Ves. 326; Hearne v. Tenant, 13 Ves. 287; Davis v. Hone, 2 Sch. & Lefr. 341; Jessop v. King, 2 Ball. & Bea. 94. If, however, the plaintiff should be guilty of conduct which would render it inequitable to assist him, whilst the defendant should not have acted improperly, or in a manner from which waiver could be implied, this Court would not remit the consequences which would ensue at law from his non-observance of the time; Lloyd v. Collett, 4 Bro. C. C. 496; S. C. 4 Ves. 689. But this Court considers both parties as equally bound to exert themselves in bringing about the completion of the contract; and therefore if they should be negligent, the one in not proceeding, and the other by acquiescence in the delay, a specific performance might be decreed; Pincke v. Curteis, 4 Bro. C. C. 329; Fordyce v. Ford, Ibid. 494; Jones v. Price, 3 Anstr. 924; Seaton v. Slade, 7 Ves. 285; Wood v. Bernal, 19 Ves. 220; Hudson v. Bartrum, 3 Madd. 440. And if the fault should lie with the defendant alone, it is hardly necessary to say that relief would be given against him; Pritchard v. Ovey, 1 Jac. & W. 396; 6 Madd. 27.

\* The usual remedy by a vendor against a purchaser for not fulfilling his contract is an action of assumpsit. To sustain a suit of this description, the plaintiff must be prepared to establish the contract of sale, the performance by himself of all conditions precedent, and the defendant's default. We have already explained (see ante, tit. Frauds, Statute of,) that by the 29 Car. 2. c. 3, 4. no action shall be brought whereby to charge any person upon any contract, or sales of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum, or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The requisites to give validity to a contract under this statute have been fully pointed out in a prior volume. It is only necessary to subjoin that the note or writing must specify the terms, for otherwise all the danger of perjury, which the statute intended to guard against, would be let in; Sugd. V. and P. 76. Thus, where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected, because it did not state the price to be paid for the estate, Blagden v. Bradbear, 12 Ves. 466; but had the receipt referred to the conditions of sale, so as to have entitled the Court to look at them for the terms, it might have been enforced as an agreement; Ibid. So, if a letter properly signed does not contain the whole agreement, yet

up the possession to him on or before the 24th June, 1798: and in consideration thereof, defendant covenanted to pay the plaintiff 120*l.* on or before the 1st August, 1797. Held that the covenant to convey and that for the payment of the money were dependant covenants, and that the plaintiff could not maintain an action for the 120*l.* without averring that he had conveyed or tendered a conveyance to the defendant; 6 East, 555.

2. *BAXTER v. LEWIS*. H. T. 1801. Exch. Forest, 61.

A bill was brought by the plaintiff for the specific performance of a contract for the purchase of an estate; to which the defendant answered that the plaintiff could not make a good title, and therefore refused to pay the purchase money. The Court referred it to the Master to inquire into the plaintiff's title, who reported it to be a good one; upon which it was decreed, that the defendant should pay the purchase money. The defendant disobeying that decree, an attachment was filed against him by order of the Court for a contempt. The Court refused the application, thinking it was incumbent on the defendant to prepare and tender the conveyance, and pay the purchase-money; 1 Cro. 718.

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if it actually refer to a writing that does, it will be sufficient, though the latter writing is not signed, and parol evidence is admissible to show the identity of the writing referred to, *Clinan v. Cooke*, 1 Sch. and Lest. 22; *Allen v. Bennet*, 3 Taunt. 169; see also *Gordon v. Trevelyan*, 1 Price, 64; *Cooper v. Smith*, 15 East, 103; *Sugd. V. and P.* 76; the agreement cannot be enforced unless both the contracting parties are named in it; *Charlowood v. Duke of Bedford*, 1 Atk. 497. But where the performance of a condition precedent has been dispensed with, the dispensation may be stated in the declaration, and the fulfilment of the condition need not be proved; *Jones v. Berkley*, Doug. 684.

\* And it is quite clear where, by the terms of the contract, the purchaser is to prepare the conveyance, the seller may bring an action for the money without tendering a conveyance. According to the case of *Phillips v. Fielding*, 2 H. Bl. 123. on averment in the declaration that the plaintiff was ready and willing to make, and did make, it appear to the defendant that he had a good and sufficient title in fee simple of, in, and to the property, is not sufficient; it ought to be shown that the plaintiff really had an estate in fee simple, or according to the terms of the sale, and the particulars of such estate; but see 6 East, 555; *Sugden's Law of Vend. and Pur.* 210. 14. 4th Edit. In *Luxton v. Robinson*, Doug. 620. it was also held that the plaintiff ought to state his title; and, where it is quite certain that the vendor was seised of the legal estate, it may be prudent, at least in one count, to make an averment accordingly, instead of risking a declaration in the general form. Where a title has been made out to the satisfaction of the defendant, an averment to that effect may suffice. See *Martin v. Smith*, 6 East, 555; 2 Wentw. 105. Where the agreement is that the vendor need not make out his title, he need not set it forth; 8 Taunt. 62. See Precedent, id. The precedent, by way of inducement, usually avers that the plaintiff was seised in fee at the time of the sale; 3 East, 410; 6 East, 555; 2 Wentw. 91. But this seems unnecessary, as it is not absolutely requisite that the vendor should have the legal title in him at that time, and it is sufficient if he obtain it a reasonable time before the day appointed for the completion of the sale; *Sugden's Law of Vend. & Pur.* 4th Edit. 210, 211; *Thompson v. Miles*, 2 Esp. Rep. 184. But if, on tendering a draft to the defendant, he refused to read it, and discharge the plaintiff from executing it, it is sufficient to prove this; it is not incumbent on the plaintiff to go on, and do a nugatory act; *Jones v. Barkley*, Doug. 684; 5 East 502; *Phillips v. Fielding*, 2 H. Bl. 123. But where, by the terms of the agreement, the vendee is to prepare the conveyance, the vendor may maintain an action without tendering a conveyance, *Hawkins v. Kemp*, 3 East, 410; and if the conveyance is to be executed at the expense of the vendee, the latter is bound to tender it; *Seward v. Willock*, 5 East. 198. See *Sugden's Law of Vendor and Purchaser*, 222; and see *Martin v. Smith*, 2 Smith, 513. But see *Heard v. Wadham*, 1 East, 627; Lord Eldon's opinion in *Seton v. Slade*, 7 Ves. jun. 278; Sir A. Macdonald's in *Growseck v. Smith*, 3 Anstr. 877; Lord Rosslyn's, in *Pincke v. Curteis*, 4 Bro. C. C. 332. Where the

[ 303 ] defendant agrees to pay the whole or part of the purchase money, on having a good title, it is necessary for the vendor to allege what title he had, and to prove it accordingly; *Phillips v. Fielding*, 2 H. Bl. 123. See the *Duke of St. Alban's v. Shore*, 1 H. Bl. 270. And where a good title is to be made out by a certain day, the vendee is not bound to make any application before the day; *Berry v. Young*, 2 Esp. C. 640. n. But where the vendor averred that he was seised in fee, and made a good and satisfactory title to the purchaser by the time specified in the conditions of sale, it was held to be sufficient, and that it was unnecessary for him to show how he deduced his title to the fee; *Martin v. Smith*, 6 East, 555. Although it is unnecessary to notice in the declaration representations in the particulars of sale as to the state of repairs and other collateral matters, yet it is essential to prove at the trial that the plaintiff can make title to the several matters as sold; *Thomson v. Miles*, 1 Esp. C. 184. Thus where the particulars of sale state a right of cart-way to be appurtenant to a house, it is sufficient to set out so much of the agreement as relates to the house, without stating that part which relates to the cartway, but still the title to the cart-way must be proved on the trial; *Ibid.* The purchaser of a lease under a contract, describing it as containing none but the usual covenants, is not bound to accept an assignment if the lease contain an unusual covenant, although it be bad in law; *Hartley v. Petrall*, *Peake's C.* 131. A defendant who has never applied for a title is not allowed to set up the want of it against the plaintiff who has obtained one; per Lord Kenyon, in *Thomson v. Miles*, 1 Esp. C. 184. after the commencement of the action. But, upon an undertaking by a vendor to convey a new inclosure to the vendee, he must convey the legal estate; it is not sufficient for the vendor to substitute the vendee's name for his own to entitle him to an assignment from the commissioners; *Casse v. Baldwin and others*, 1 Stark. Rep. 65. It is not sufficient to show by mere presumptive evidence that the premises have been discharged from an incumbrance to which they were formerly subject. Where a leasehold was sold as subject to a ground rent, which was said to have been apportioned out of a larger rent, but such an apportionment was not evidenced by any existing deed, but only by presumptive evidence, it was held that the purchaser was not bound to accept the title; *Burnwell v. Harris*, 1 Taunt. 434. Where the objection to a title was, that it was doubtful whether the wife of a party to a deed thirty years old was barred by that deed of her dower, it was held that it was no answer to prove upon the trial that the wife was dead, no such proof having been given before; *Wilde v. Fort*, 4 Taunt. 334. It seems to be quite settled that a court of law will take notice of equitable objections to titles; it would be fruitless to compel the defendant to pay money which a court of equity will order him to refund; *Maberly v. Robins*, 1 Marsh. 258; 5 Taunt. 625; and per Lord Alvanley, in *Elliott v. Edwards*, 3 B. & P. 181. In the case of *Alpass v. Watkins*, 8 T. R. 516. Lord Kenyon held that a court of law could not enter into equitable objections to a title where the purchaser is plaintiff; where the words of the condition were, that the vendor should make a good title, it was held that he must make out a title good both at law and in equity, *Malberly v. Robins*, 1 Marsh. 258; for the question is, whether the condition has been complied with. The plaintiff must prove his title to the property sold; and if he produces his title deeds at the trial in proof of his title, it seems that it will not be necessary for him to call the subscribing witnesses; *Sugd. V. & P.* 216; 2 Phil. Ev. 99; *Thompson v. Miles*, 1 Esp. 185; *sed vide Crosby v. Percy*, 1 Campb. 304. *contra*; in which it was holden by Mansfield, C. J., that the remote assignee of a term cannot prove his interest without proving the original lease and the mesne assignments; *Earl v. Baxter*, 2 Bl. Rep. 1228; *Doe v. Parker*, *Peake, Ev.* 59.

If the purchaser has not made an application for the title before the commencement of the action, and no time is fixed upon for completing the contract, it will be sufficient if the plaintiff can show a good title in himself at the time of the trial; *Thompson v. Miles*, 1 Esp. 185; *Wilde v. Forte*, 4 Taunt. 336; *Bartlett v. Tuchin*, 6 Taunt. 259. It is good ground for defence under

(c) *To interest on purchase money.\**

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the general issue that an erroneous misstatement or misdescription has been wilfully introduced into the conditions of sale, to make the land appear more valuable; *Duke of Norfolk v. Worthy*, Campb. 340; and see *Vernon v. Keys*, 12 East, 637. So, where a person is employed to bid by the vendor at the sale, not for the purpose of preventing a sale at an undervalue, but to take the advantage of the eagerness of the bidders to screw up the price, it seems that this will be deemed a fraud; *Smith v. Clarke*, 12 Ves. 483; *Sudg. V. & P.* 24; *Howard v. Castle*, 6 T. R. 642. See *ante*, tit. Auction and Auctioneer. The defendant may also insist upon a defect in the plaintiff's title, and it seems that a court of law will enter into equitable objections to a title; *Malberly v. Robins*, 5 Taunt. 625; *Elliot v. Edwards*, 3 B. & P. 181; *Sudg. V. & P.* 219; but see *Alpasse v. Watkins*, 8 T. R. 516; *Romilly v. James*, 1 Marsh, 600; 2 Phil. Ev. 101; see also *Rex v. Toddington*, 1 B. & A. 560. So, that the defendant may show that the plaintiff had an interest in the premises for a shorter time than he contracted to sell, *Farrer v. Nightingale*, 2 Esp. 639; *Hibbert v. Shee*, 1 Campb. 113; or that the premises are subject to an incumbrance or annual payment, of which no notice has been given; *Turner v. Beaurain*, *Sudg. V. & P.* 252; *Barnwell v. Harris*, 1 Taunt. 430. The purchaser may reject a questionable title; and therefore a purchaser of a lease under a contract describing it as containing none but the usual covenant, though such covenant is probably bad in point of law; *Hartley v. Pellhall*, Peake, 131; see also *Waring v. Hoggart*, 1 R. & M. 39. Where a lease was sold by auction, and produced and read at the time, and amongst the premises demised was a summerhouse, which had been pulled down before the sale, it was held that the purchaser was not bound to complete the contract, though no mention was made of the summer house in the particulars of sale; *Granger v. Worms*, 4 Campb. 83. Where the property consisted of several parcels sold by auction in distinct lots, Lord Kenyon held that the vendor having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern, and that the contract, for the convenience and interest of the purchaser, must be understood to be an entire contract for the whole; *Chambers v. Griffith*, 1 Esp. 149; but see *Emmerson v. Heelis*, 2 Taunt. 38; *James v. Shore*, 1 Stark. 36; *Sudg. V. & P.* 257; where it is said that *Chambers v. Griffith* cannot be maintained as an authority; the purchaser may refuse to take a conveyance executed under a power of attorney, as it multiplies his proofs; *Coore v. Callaway*, 1 Esp. 116; *Richards v. Barton*, Id. 268.

\* Equity considers that which is agreed to be done as actually performed, and a purchaser is therefore entitled to the profits of the estate from the time fixed upon for completing the contract, whether he does or does not take possession of the estate, 6 Ves. jun. 143. 352; and as from the time the money belongs to the vendor, the purchaser will be compelled to pay interest for it, if it be not paid at the day; *Davy v. Barber*, 2 Atk. 489; *Sir James Lowther v. the Countess Dowager of Andover*, 1 Bro. C. C. 396; and see 6 Ves. jun. 352. This is so plain a rule that no disputes could ever arise on it if the purchase money were not frequently lying dead; in which case it becomes a question whether the loss of interest shall fall on the vendor or purchaser.

If the delay in completing the contract be attributed to the purchaser, he will be obliged to pay interest on the purchase money from the time the contract ought to have been carried into effect, although the purchase money has been lying ready, and without interest being made of it; *Calcraft v. Roebuck*, 1 Ves. jun. 221; *Sudgen, V. and P.* But if the delay be occasioned by the default of the vendor, and the purchase money has lain dead, the purchaser will not be obliged to pay interest. The purchaser must, however, give notice to the vendor that the money is lying dead, *Calcraft v. Roebuck*, *ubi. sup.* as otherwise there is no equality; the one knows the estate is producing interest, the other does not know that the money does not produce interest;

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(d) *To lien on the estate for purchase money.*†

(B) AS REGARDS THE PURCHASER.

FIRST. OF HIS RIGHTS.

Powell v. Martyr, 8 Ves. jun. 146; Comer v. Walkley, cited *infra*. Wherever, therefore, a purchaser is delayed as to the title, and means to insist upon this, he ought to apprise the other party that he was making no interest; but even if a purchaser gave such notice, yet if it appears that the money was not actually and *bona fide* appropriated for the purchase, or the purchaser derived the least advantage from it, or in any manner made use of it, the Court would compel him to pay interest. If no time be limited for performance of the agreement, and the purchaser be let into possession of the estate, he must pay interest on the purchase money from that time; see *ex parte* Manning, 2 P. Wms. 410.

It cannot, however, be laid down as a general rule, that a purchaser of estates under a private agreement shall from the time of taking possession pay interest. At any rate, although the conveyance be executed, yet he shall not pay interest but from the time of taking possession, if prevented from so doing by the vendor; *per* Lord Hardwicke, in Blount v. Blount, 3 Atk. 636. But it must be a strong case, and clearly made out, in which he shall not pay interest where he has received the rents and profits; 8 Ves. jun. 148. 149. Where interest is recovered at law, it is always at the rate of 5l. per cent, but in equity the rate of interest allowed has usually been 4 per cent.; Calcraft v. Roebuck, 1 Ves. jun. 221; Child v. Lord Abingdon, 1 Ves. jun. 94; Comer v. Walkley, Reg. Lib. A. 1784. fo. 625; Pollexfen v. Moore, Reg. Lib. B. 1745. fo. 283. at the bottom; Smith v. Hibbard, Chan. July 11, 1789; McQueen v. Farquhar, Lib. Reg. B. 1804. fol. 1095; Browne v. Fenton, Rolls, June 23, 1807. M. S.; and see Lord Rosslyn's judgment in Lloyd v. Collet, 4 Ves. jun. 609. n.; Sugden. V. & P. In Blount v. Blount, 3 Atk. 636. Lord Hardwicke said, the Court would give such interest as was agreeable to the nature of the land purchased; but this seems never to be taken into consideration, nor indeed ought it to be; interest being given not so much on account of the profits of the estate, as the unjust detention of the purchase money. The true principle by which the rate of interest should be fixed seems to be the market rate of interest of money secured on landed property; Incledon v. Northcote, 3 Atk. 438. 439; and see 2 Ves. jun. 511, 512; *sed vide* Sitwell v. Barnard, 6 Ves. jun. 520; and therefore in a late case, a purchaser was declared to pay interest at 4l. 10s. per cent; Sugden V. & P.

† Where a vendor delivers possession of an estate to a purchaser without receiving the purchase money, equity, whether the estate be, Chapman v. Tanner, 1 Vern. 267; Pollexfen v. Moore, 3 Atk. 272; and see 1 Bro. C. C. 302. 424; 6 Ves. jun. 483; or be not, Smith v. Hibbard, 2 Dick. 730; Charles v. Andrews, 9 Mod. 152. conveyed, and although there was not any special agreement for that purpose, gives the vendor a lien on the lands for the money; so, on the other hand, if the vendor cannot make a title, and the purchaser has paid any part of the purchase money, it seems that he has a lien for it on the estate, although he may have taken a distinct security for the money advanced; Lacon v. Mertins, 3 Atk. 1.

But equity would not formerly raise this equitable lien in favour of a papist incapable of purchasing, Harrison v. Southcote, 2 Ves. as it would have been giving him an interest in land. If a vendor take a distinct and independent security for the purchase money, his lien on the estate is gone; such a security is evidence that he did not trust to the estate as a pledge for his money; 6 Ves. jun. 483. But it seems quite clear, that merely taking a covenant, bond, or note, for the purchase money, or any part of it, will not discharge the vendor's equitable lien on the estate; and it seems that the same rule must prevail, although the estate is sold for an annuity, and a covenant, bond, or note, is taken for securing the payment of it; Tardiffe v. Scrughan, 1 Bro. C. C.

- (a) *Entitled to the estate in equity from the time of the contract.\**  
 (c) *To action against vendor for not completing the contract.*

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423, cited. Where a security by bond or note is given for the purchase money, and it is intended that the vendor shall not have a lien on the estate for the money, a declaration to that effect should be inserted in the conveyance, which would effectually prevent a lien being raised by equity upon the presumed intention of the parties. Although equity raises a lien in favour of a vendor, yet it is not extended to third persons, that is, where the vendor is satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person cannot resort to the equitable lien of the vendor on the estate, or, in other words, cannot require the purchased estate and the personal estate to be marshalled. It appears, then, that this equitable lien prevails against the purchaser and his heir, and all persons claiming under him, with notice, although for valuable consideration; *Hearne v. Botelers*, Cary's Cha. Rep. 25; *Walker v. Preswick*, 2 Ves. 622; *Gibbons v. Baddall*, 2 Eq. Ca. Abr. 682, n. C. to D.; *Elliot v. Edwards*, 3 Bos. and Pull. 181. But it of course would not prevail against a *bona fide* purchaser without notice, and the mere deduction of the title to the estate from the first vendor by recital will not be sufficient to affect him, for that does not show it was not paid for; 1 Bro. C. C. 302.

\* In equity, when a contract is made for the sale of an estate, the Court considers the vendor as a trustee for the purchaser of the estate sold; *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Cha. Ca. 39; *Lady Fohain's case*, cited *Ibid*; and see 1 Term Rep. 601; *Green v. Smith*, 1 Atk. 572; and the purchaser as a trustee of the purchase money for the vendor, *Green v. Smith*, *ubi supra*; *Pollexfen v. Moore*, 3 Atk. 272. Therefore the contract will not be discharged by the bankruptcy of either the vendor, *Orlebar v. Fletcher*, 1 P. Wms. 737; or vendee, 3 Ves. jun. 255; *Bowles v. Rogers*, 6 Ves. jun. 25, n. So, the death of the vendor or vendee before the conveyance, *Paul v. Wilkins*, Poth. 106; or surrender, *Barker v. Hill*, 2 Chap. Rep. 113; or even before the time agreed upon for completing the contract, is in equity immaterial; *Winged v. Lefebury*, 2 Eq. Ca. Ab. 32, Pl. 43. If the vendor die before payment of the purchase money, it will go to his executors, and form part of his assets, *Sikes v. Lister*, 5 Vin. Abr. 541. Pl. 28; *Baden v. Earl of Pembroke*, 2 Vern. 213; *Bubb's case*, 2 Freem. 38; *Smith v. Hibbard*, 2 Dick. 712; *Foley v. Percival*, 4 Bro. C. C. 419; and even if a vendor reserve the purchase money, payable as he shall appoint by an instrument executed in a particular manner, and afterwards exercise his power, the money will, as between his creditors and appointees, be assets; *Thompson v. Soane*, 2 Vern. 319, 466.

A vendee being actually seized of the estate in contemplation of equity, must bear any loss which may happen to the estate between the agreement and conveyance, and will be entitled to any benefit which may accrue to it in the interim. It is a consequence of the same rule, that a purchaser may sell or charge the estate before the conveyance is executed, *Seaton v. Slade*, 7 Ves. jun. 265; 1 Ves. 220; 6 Ves. jun. 352; but a person claiming under him must submit to perform the agreement *in toto*, or he cannot be relieved: *Dyer v. Pulteney*, Barnard, Rep. Cha. 160. So, he may devise the estate if freehold, *Davis's case*, 3 Salk. 85; *Miller v. Mills*, Mose. 123; *Alleyne v. Alleyne*, Mose. 262; *Atcherley v. Vernon*, 10 Mod. 518; *Gibson v. Lord Montford*, 1 Ves. 485, before the conveyance; and if copyhold, before the surrender, *Davie v. Beardsham*, 1 Cha. Ca. 39; *Nels. Cha. Rep.* 76; *Cha. Rep.* 2; *Greenhill v. Greenhill*, 2 Vern. 679; *Prec. Cha.* 320; *Atcherley v. Vernon*, 10 Mod. 518; *Robson v. Brown*, Oct. 1740. S. P.; 9 Ves. jun. 510; and that, although the estate is contracted for at a future day, *Trimuel's case*, Mose. 265, cited; *Atcherley v. Vernon*, 10 Mod. 518; *Gibson v. Lord Montford*, 1 Ves. 485; or the contract is entered into by a trustee for him; *Greenhill v. Greenhill*, 2 Vern. 679. And the devisee will be entitled

1. *On the special contract.\**

CORNISH v. ROWLEY. M. T. 1793. K. B. Selw. N. P. 170. Abridged fully ante, tit. Money Had and Received. S. P. BERRY v. YOUNG. T. T. 1795. 2 Esp. 640.

The vendee may sustain an action if the vendor is not prepared to make out a good title on the day on which the purchase is to be completed.

Per Lord Kenyon. The vendor must be prepared to make out a good title on the day when the purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament. But this indulgence is voluntary on the part of the intended purchaser. It is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed; if the seller deliver an abstract setting forth a defective title, the plaintiff may object to it.

to have the estate paid out of the personal estate of the purchaser; *Milner v. Mills*, Mose, 123; *Brome v. Monck*, 10 Ves. jun. 597; *Sug. V. & P.* 136.

\* If the vendor refuses, or is unable to complete his contract, the purchaser may declare specially on the contract; in case he has made a deposit, or paid any part of the purchase money, he may recover it in an action for money had and received. In the former action he will be entitled to recover the deposit, and also interest, and any expences to which he may have been put in investigating the title by way of special damage; in the latter he will be entitled to recover the purchase money or deposit only; *Camfield v. Gilbert*, 4 Esp. 221; *Walker v. Constable*, 1 B. and P. 306; *Sugd. V. and P.* 213. In neither form of action can he recover compensation for the fancied goodness of his bargain, where the vendor is without fraud incapable of making a title, *Flureau v. Thornhill*, 2 W. Bl. 107; *Bratt v. Ellis*, *Sugd. V. and P.* 40; the expenses of investigating the title cannot be recovered under a count for money paid; *Camfield v. Gilbert*, 4 Esp. 22. In a special action on the contract by the purchaser, he must prove the performance by himself of all conditions precedent, the defects of the vendor's title; and, when he seeks to recover the deposit, the payment of such deposit. It will not be enough to prove that the title has been deemed by conveyance to be insufficient.

The plaintiff is entitled to recover damages on counts properly framed; not only the amount of his deposit, but also interest upon it, and even interest on the residue of the purchase money, which has been lying ready to be paid without making interest; *Flureau v. Thornhill*, 2 Black. 1078. It seems that he may also recover the expenses incurred in investigating the title; *Kirtland v. Pounsett*, 2 Taunt. 145; *Turner v. Beaurian*, cor. Lord. Ellenborough, Guildh. 2nd June, 1806; but see *Camfield v. Gilbert*, 4 Esp. C. 221; and *Wild v. Fort*, 4 Taunt. 334, where *Mansfield, C. J.*, held the contrary; and ruled also that interest on the deposit was not recoverable. And where the vendor misrepresents the charges affecting the estate, the purchaser may recover the interest of the money procured to complete the purchase, as well as the expenses of investigating the title and completing the conveyance; *Richards v. Barton*, 1 Esp. C. 268; *Turner v. Beaurian*, *Sugd. V. & P.* 209; *Coore v. Calloway*, 1 Esp. C. 115; as, where the intended grantor of an annuity represents that there was no judgments against him, in consequence of which the intended purchaser does not search until the transaction is ready to be completed; *Coore v. Calloway*, 1 Esp. C. 115. And if the action be brought against an agent who sold without sufficient authority, the plaintiff may also recover the costs of a suit against the principal for a specific performance; *Jones v. Dyke*, *Sugden's V. & P. App. No. 8.*

Where the vendee relies on a defect in the vendor's title, and no fraud is imputable to the vendor, the plaintiff does not usually recover more than nominal damages; *B. & P.* 107; *Flureau v. Thronhill*, 2 Blac. 1078; *Brig's case*, Palm. 364. In the case of *Bratt v. Ellis*, C. B. Mich. and Hil. T. 45 Geo. 3, cited in *Mr. Sugden's Treatise*, App. No. 7, where an auctioneer having a lien on property, sold it after the expiration of the authority given him by the owner, who refused to complete the contract, the Court is stated to



## 2. To recover the deposit.\*

(d) To what title to the estate he may insist on.†

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have held that the purchaser was not entitled to more than the deposit, with interest, the costs of investigating the title, and the costs of the action as between attorney and client; although the jury, on the execution of a writ of inquiry, after judgment by default, had given a verdict for 3150*l.* allowing 350*l.* as damages for the loss of the bargain.

\* In an action for money had and received to recover the deposit, or any portion of the purchase money, which may have been paid, the plaintiff must prove the contract, the payment of the money and the defects in the vendor's title. To enable the purchaser to maintain this action the contract must be disaffirmed *ab initio*. If the purchaser has had an occupation of the premises under the contract, he adopts the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put in the same situation in which they before stood; *Hunt v. Silk*, 5 East, 449. If the original contract be void, as if it be a parol agreement for the sale of lands, the purchaser can only recover his deposit in this form of action, since he cannot sue upon the special contract; *Walker v. Constable*, 1 B. & P. 306. Interest cannot be recovered under a count for money had and received, *Ibid*; *Tappendal v. Randall*, 2 B. & P. 472; *Marshal v. Poole*, 13 East, 100. Where the vendor was unable to complete his contract on the day, and it also appeared that the purchaser was not prepared to pay the purchase money on that day, *Best, C. J.*, held, that the agreement was entirely vacated, and the purchaser entitled to recover his deposit; *Clarke v. King*, 1 R. & M. 394. Although a purchaser be expressly required to tender a conveyance, yet, if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering a conveyance; *Lowndes v. Bray*, Sugd. V. & P. 223. So, where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on his part is unnecessary, and he may accordingly sustain an action without tendering a conveyance or the purchase money; *Knight v. Crockford*, 1 Esp. 188; Sugd. V. & P. 223. A payment of the deposit to the agent of the vendor is, in law, a payment to the principal; and in action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not; *Duke of Norfolk v. Worthy*, 1 Campb. 337. If the deposit has been paid to the auctioneer, an action will lay against him before payment over to his principal, *Burrough v. Skinner*, 5 Burr. 2639; and see *Edwards v. Hodding*, 5 Taunt. 815; but it seems that interest on the deposit cannot be recovered from him except under particular circumstances; at all events, not before a demand for the repayment of the money has been made upon him; *Lee v. Munn*, 8 Taunt. 45; *Farquhar v. Farley*, 7 Taunt. 594; Sugd. V. & P. 487. Where an auctioneer does not disclose the name of his principal, an action will lie against himself for damages on breach of contract; *Hanson v. Roberdeau, Peake*, 120; and see *Simon v. Motivos*, 3 Burr. 1921; *Owen v. Gooch*, 2 Esp. 567. Where the purchaser recovers the deposit only from the auctioneer, he may, in a special action against the vendor, recover interest, and the expenses of investigating the title; *Farquhar v. Farley*, Taunt. 592.

† A purchaser has a right to require a title commencing at least sixty years previously to the time of his purchase, because the Statute of Limitations, 32 Hen. 8, c. 2; 21 Jac. 1, c. 16; could not in a shorter period confer a title. Even sixty years are not sometimes sufficient; for instance, if it may reasonably be presumed, from the contents of the abstract, that estates tail were subsisting, the purchaser may demand the production of the prior title. It appears that a purchaser of a leasehold estate must insist upon the production of the lessor's title; for a lessee is a purchaser *pro tanto*; and it should, therefore seem that he is not entitled to call upon the lessor for an inspection of his title, but would not meet with any favour if he neglected to do so, for no one's misfortune is so much slighted by the Court as his who buys a thing in the realty,

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The title of  
ferred to the  
purchaser  
must be a  
good legal  
title, and  
not merely  
an equitable  
one.

HARTLEY v. PEKALL. T. T. 1791. Peake, 131.

This was an action on an agreement to take a public-house. At the time the parties were treating about the house, the defendant's appraiser was proceeding to examine the lease, when the plaintiff stopped him; the lease contained nothing but the usual and ordinary covenants, and the house was a free house. The plaintiff was not the original lessee, but the person who had assigned the lease to him were brewers, and had procured a covenant to be inserted that the plaintiff, his executors, administrators, and assigns, should deal with them, and purchase at their brewery all the beer consumed in the house. No such covenant was inserted in the original lease.

Per Lord Kenyon. When a man buys any commodity, he expects to have a clear indisputable title, and not such a one as may be questionable at least in a court of law. No man is obliged to buy a lawsuit.

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If the ven-  
dor be not  
ready with  
his abstract  
and title  
deeds at  
the day fix-  
ed, the pur-  
chaser may

(c) *To have an abstract.* See also *ante*, tit. Abstract.

BERRY v. YOUNG. E. T. 1796. 2 Esp. 640. n.

Before a sale of an estate, it was agreed that a good title should be made out by the 10th of July. In the beginning of July the purchaser called on the vendor to show him the title deeds; but he not having them in his possession, gave the purchaser an abstract of the title, which did not contain any of the deeds; and although it was suggested that an application ought to have been made to the vendor at an earlier period, yet

and does not look into the title; *Roswell v. Vaughan*, Cro. Jac. 196; *Lysney v. Selby*, 2 Ld. Raym. 1118; in *Keech v. Hall*, Doug. 21; and see *Waring v. Mackreth*, For. Ex. Rep. 129; 11 Ves. jun. 343. Lord Mansfield appears to have taken it for granted that a lessee had a right to examine the title deeds and not even a *dictum* to the contrary has ever been judicially advanced; *Waring v. Mackreth*, For. Ex. Rep. 129; 11 Ves. jun. 343; 12 Id. 326. A purchaser may refuse to accept a conveyance executed under a power of attorney; *Coore v. Calloway*, 1 Esp. 115; *Richards v. Boston*, 1 Esp. 268.

Although a purchaser cannot be compelled to take a doubtful title; yet nevertheless he will not be permitted to object to a title on account of a mere probability, because a court of equity, in carrying agreements into execution, governs itself by a moral certainty; it being impossible, in the nature of things, that there should be a mathematical certainty of a good title; therefore, suggestions of old entails, or doubts what issue persons have left, whether more or fewer, are never allowed to be objections of such force as to overturn a title to an estate; 1 Atk. 20, per Lord Hardwicke; and see *Lord Braybrooke v. Inskip*, 8 Ves. jun. 417; *Dyke v. Silvester*, 12 Ves. jun. 126. So, where, *Lyddal v. Weston*, 2 Atk. 19, upon a purchase, it appeared that the estate had been originally granted by the crown, in which grant there was a reservation of tin, lead, and all royal mines; yet, as there had been no search made for the mines for 111 years, and, upon examination, the probability was great there were no such mines, Lord Hardwicke decreed a specific performance. Where an abstract begins with a recovery to bar an entail, it is usual in practice to call for the deed creating the entail, in order to see that the estate tail and remainder over, if any, were effectually barred. But if the deed is lost, and possession has gone with the estates by the recovery for a considerable length of time, and the presumption is in favour of the recovery having been duly suffered, the purchaser will be compelled to take the title, although the contents of the deed creating the entail do not actually appear; *Coussmaker v. Sewell*, Ch. 4 May, 1791. M. S. Sugd. V. & P. Where a vendor is tenant in tail, with reversion to himself in fee, and the reversion has vested in different persons, a common recovery is generally required by the purchaser; because that bars the remainder, while a fine lets it into possession, and thereby subjects the whole fee to any incumbrance which before affected the reversion only. But unless some incumbrance appear, or the title to the reversion is not clearly deduced the Court will refuse to compel a vendor to suffer a recovery, on account of the mere probability of the reversion having been incumbered.

Lord Kenyon ruled otherwise, as the seller, he said, ought to be prepared to produce his title deeds at the particular day.

(f) To an assignment of outstanding terms †. See also *ante*, tit. Trustees.

(g) To attested copies of deeds. ‡

(h) To a covenant for title. §

SECOND. OF HIS DUTIES AND LIABILITIES.

(a) To search for incumbrances. ||

\* The vendor must at his own expense furnish the purchaser with an abstract of his muniments, and deduce a clear title to the estate. Formerly, the title deeds themselves were delivered to the purchaser, and his solicitor prepared the abstract at his expense, and the abstract was compared with the title deeds by the counsel before whom it was laid. The abstract ought to mention every incumbrance whatever effecting the estate, and should, therefore, contain an account of every judgment by which the estate is affected; *Richards v. Barton*, 1 Esp. Ca. 268. But equity considers it complete whenever it appears that, upon certain acts done, the legal and equitable estates will be in the purchaser, which may be long before the title can be completed; 8 Ves. jun. 436. The strict rule seems to be, that the vendor must procure the fee to be vested either in himself or a trustee for him, and that a purchaser is not compellable to bear the expense of a long conveyance, on account of the legal estate having been outstanding for a length of time, or of the estate being subject to incumbrances, which are to be paid off; 1 H. Blackst. 280. It is not, however, very usual to insist upon this, unless the title cannot be perfected without a private act of parliament, in which case, the expense of obtaining it is always borne by the vendor. Unless there be an express stipulation to the contrary, the expense of the conveyance falls on the purchaser, 2 Ves. jun. 155. and note; this is the universal practice of the profession, who, as we have already seen, must in that case prepare and tender the conveyance. The expense attending the execution of the conveyance is, however, always borne by the vendor; *Sugd. V. and P.* This rule does not, however, prevail in equity; for it is there considered equally incumbent on the purchaser to ask for the abstract, as the vendor to deliver it. And, therefore, if a purchaser do not call for the abstract before the time agreed upon for its delivery, *Guest v. Homfray*, 5 Ves. jun. 818; or do not ask for it until it has become impossible to execute the agreement by the day fixed, *Jones v. Price*, 3 Anstr. 924; equity will consider the time as waived. So, if the purchaser receive the abstract after the day appointed, and do at the time object to the delay, he cannot afterwards insist upon it as a bar to a performance in specie; *Smith v. Burnam*, 2 Anstr. 527; and see *Seton v. Slade*, 7 Ves. jun. 265.

† The importance of obtaining an assignment of all outstanding terms cannot be too strongly impressed on purchasers. If a purchaser have no notice, and happens to take a defective conveyance of the inheritance, defective either by reason of some prior conveyance, or of some prior charge or incumbrance; and if he also take an assignment of a term to a trustee, for him, or to himself, where he takes the conveyance of the inheritance to his trustee, in both these cases he shall have the benefit of the term to protect him, that is, he may make use of the legal estate of the term to defend his possession; or, if he has lost his possession to recover it at common law, notwithstanding that his adversary may at law have the strict title of the inheritance; *Willoughby v. Willoughby*, 1 T. R. 763. per Lord Hardwicke; and see *For. 69*. The expense of the assignment of terms of years which a purchaser can require to be assigned to attend the inheritance must be borne by the purchaser himself, but the title to them must of course be deduced at the expense of the vendor; and, if a term has never been assigned to attend the inheritance, the vendor must bear the expense, not only of deducing the title, but also of the assignment of the term to a trustee of the purchaser's nomination to attend the inheritance.

‡ If a purchaser cannot obtain the title-deeds, he is, as we have already seen, entitled to attested copies of them at the expense of the vendor, unless there be an express stipulation to the contrary; *Dare v. Tucker*, 6 Ves. jun. 460; *Berry v. Young*, 2 Esp. Ca. 640, n.; and although he may not be entitled to the possession of the deeds, yet he has a right to inspect them, and the vendor must produce them for that purpose; *Berry v. Young*, *ubi sup.* But a purchaser is not entitled to attested copies of instruments on record.

§ The purchaser is authorized to insist on a covenant for good title. The nature and effect of this covenant has been fully stated and examined under tit. Covenant, *ante*.

|| There are few cases in which judgments should not be searched for on the part of the purchaser, and if there is any reason to suspect the vendor, it is absolutely necessary to search immediately before the conveyance is executed, lest any judgments may have been entered up during the treaty; although if any judgments should be entered up after the purchase money, being an adequate consideration, is actually paid, equity would relieve the purchaser against the judgments, notwithstanding that they were entered up previously to the execution of the conveyance, the vendor being in equity only a trustee for the purchaser, and a judgment being merely a general lien, and not a specific lien on the land; and this equity prevails whether the judgment creditor had or had not notice of the contract; *Nels. Cha. Rep. 184*; *Finch v. Earl of Winchelsea*, 1 P. Wms. 278; 10 Mod. 418; 11 Vin. If the estate lie in a register county, the register's office should be searched for the purpose of ascertaining not only that the estate is free from incumbrances, but also that the title deeds

avoid the agreement at law.\*  
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(b) *Liability to incumbrances.\**

are duly registered, as the estate may be lost by neglecting to do so. And if it appear that any deed has not been duly registered, the vendor must procure it to be registered at his own expense previously to the completion of the contract; although, indeed, it sometimes happens that an instrument not being registered prevents an objection being made to the title.

\* It appears, therefore, that there are two cogent reasons why a memorial of the conveyance should be duly registered immediately after the execution of the conveyance: the one, that a prior incumbrancer might, during the delay, register the incumbrance; the other, that a delay might give an unprincipled vendor an opportunity of selling the estate to a *bona fide* vendee without notice; who, if he registered his deeds before the registry of the first conveyance, would certainly prevail against the first purchaser; Sugden, V. and P. 3. ch. 291. A court of equity acts upon the conscience, and as it is impossible to attach any demand upon the conscience of a man who has purchased for a valuable consideration, *bona fide*, and without notice of any claim on the estate, such a man is entitled to the peculiar favour and protection of a court of equity.

And it has been laid down as a general rule that, a purchaser *bona fide* and for a valuable consideration, without notice of any defect in his title at the time he made his purchase, may buy or get in a statute, mortgage, or any other incumbrance, (and that although it is satisfied); and if he can defend himself at law by any such incumbrance, his adversary shall never be aided in a court of equity for setting aside such incumbrance, for equity will not disarm a purchaser, but assist him; and precedents of this nature are very ancient and numerous; viz. where the Court has refused to give any assistance against a purchaser, either to an heir or to a vendor, or to the fatherless, or to creditors, or even to one purchaser against another, Basset v. Nosworthy, Finch. 102; Jerrard v. Saunders, 2 Ves. jun. 454; Anon. 2 Cha. Ca. 208; Hithcox v. Sedgwick, 2 Vern. 156. And the favour and the protection of a court of equity is extended to a purchaser, not only where he has a prior legal estate, but also where he has a better right to call for the legal estate than any other person; 2 Vern. 600; Willoughby v. Willoughby, 1 T. R. 763; Blake v. Sir Edward Hungerford, Pr. Ch. 158; Charlton v. Low, 3. P. Wms. 328; *ex parte* Knott, 11 Ves. jun. 609.

A purchaser cannot, however, protect himself by taking a conveyance or assignment of a legal estate from a trustee in whom it was vested upon express trusts; Saunders v. Deheu, 2 Vern. 271; 2 Freem. 123. But if a purchaser have notice of any claim or incumbrance, his conscience is affected; and a court of equity will then not only refuse to interfere in his favour, but will assist the claimant or incumbrancer in establishing his claims against him; his having given a consideration will not avail him; for, as Lord Hardwicke observes, he throws away his money voluntarily and of his own free will; 3 Atk. 238; Fitz. S. Subpcena, Pl. 2. And it may be laid down as a general rule, that a purchaser with notice is in equity bound to the same extent and in the same manner as the person was of whom he purchased, Winged v. Lefebury, 169; 1 Eq. Ca. Abr. 32. Pl. 43; Jackson's case, Lane, 60; Gore v. Wigglesworth, cited Ibid; Earl Brook v. Buckeley, 2 Ves. 498; Taylor v. Hibbert, 2 Ves. jun. 437; Lord Verney v. Carding, 1 Sch. & Lef. 345. cited; thus, suppose trustees for preserving contingent remainders to join in destroying them, and to convey the estate to a purchaser, if the purchaser buy for a valuable consideration, and without notice, he cannot be effected; but if he buy with notice of the trust, although for a valuable consideration, he must convey the estates to the uses of the settlement; Mansell v. Mansell, 2 P. Wms. 678.

Notice is either actual or constructive; but there is no difference between actual and constructive notice in its consequence; Amb. 626. Of actual notice little can be said; it requires no definition, and it need only be remarked that, to constitute a binding notice it must be given by a person interested in the property, and in the course of the treaty for the purchase. Vague reports

(c) *To see to the application of the purchase money.\**

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from persons not interested in the property will not affect the purchaser's conscience; nor will it be bound by notice in a previous transaction which he may have forgotten. Constructive notice, in its nature, is no more than evidence of notice, the presumptions of which are so violent, that the Court will not allow even of its being controverted, 2 Anstr. 438. *per* Eyre, C. B.; but it is difficult to say what will amount to constructive notice. The following rules may perhaps assist the learned reader in his researches:—1. Notice to the counsel, attorney, or agent of the purchaser, is notice to him; *Newstead v. Searles*, 1 Atk. 265; *Le Neve v. Le Neve*, 3 Atk. 646; 1 Ves. 64; *Brotherton v. Hatt*, 2 Vern. 574; *Aspley v. Baillie*, 2 Ves. 368; *Maddox v. Maddox*, 1 Ves. 61; and see 3 Cha. Ca. 110. for otherwise, as Lord Talbot observed, a man who had a mind to get another's estate might shut his own eyes, and employ another to treat for him who had notice of a former title, which would be a manifest cheat; *Attorney General v. Gower*, 2 Eq. Ca. Abr. 685. Pl. 11; *Ambl. 626*. And the same rule prevails, although the counsel, attorney, or agent, be the vendor; *Sheldon v. Cox*, *Ambl. 624*; or be concerned for both vendor and purchaser; *Le Neve v. Le Neve*, 3 Atk. 646.

\* Where a trust is raised by deed or will for sale of an estate, a clause that the receipts of the trustees shall be sufficient discharges for the purchase money is mostly inserted, and rarely ought to be omitted, because notwithstanding that a purchaser would at law be safe in paying the money to the vendors, although they are trustees, yet in equity will, in some cases, bind purchasers to see the money applied according to the trust, if they be not expressly relieved from that obligation by the author of the trust; and where the purchaser is bound to see to the application of the money, great inconvenience frequently ensues, and in some instances it would be difficult to compel the purchaser to complete the contract.

1. If the trust be of such a nature that the purchaser may reasonably be expected to see to the application of the purchase money, as if it be for the payment of legacies, or of debts which are scheduled or specified, he is bound to see that the money is applied accordingly; *Culpepper v. Aston*, 2 Cha. Ca. 221; *Show. 313*; *Spalding v. Shalmer*, 1 Vern. 301; *Duneh v. Kent*, 1 Vern. 260; *Anon. Mose. 26*; *Abbott v. Gibbs*, 1 Eq. Ca. Abr. 358. Pl. 2; *Elliot v. Merryman*, *Barnard, Rep. Cha. 81*; *Smith v. Guyon*, 1 Bro. C. C. 186; and the cases cited in the note. One of these cases, *Langley v. Lord Oxford*, is in *Reg. Lib. B. 1747. fol. 300*; *S. C. Ambl. 17*. The other cases, *Tenant v. Jackson*, and *Cotton v. Everall*, are in *Reg. Lib. 1773. B. fol. 120. 481*; and see 1 Ves. 215; and that, although the estate be sold under a decree of a court of equity; *Lloyd v. Baldwin*, 1 Ves. 173. or by virtue of an act of parliament; *Cotterell v. Hampson*, 2 Vern. 5.

2. If more of an estate be sold than is sufficient for the purposes of the trust, that will not turn to the prejudice of the purchaser; for the trustees cannot sell just so much as is sufficient to pay the debts, &c. Besides, in most cases, money is to be raised to pay the trustees' expenses; *Spalding v. Shalmer*, 1 Vern. 301.

3. Where the trust is for payment of debts generally, a purchaser is not bound to see to the application of the purchase money, although he has notice of the debts, as a purchaser cannot be expected to see to the due observance of a trust so unlimited and undefined. See the cases cited above, and *Humble v. Bill*, 1 Eq. Ca. Abr. 358. Pl. 4. *ex parte Turner*, 9 Mod. 418; *Hardwicke v. Mynd*, 1 Anst. 109; and *Williamson v. Curtis*, 3 Bro. C. C. 96.

4. Nor is a purchaser bound to see the money applied where the trust is for payment of debts generally, and also for payment of legacies. The above rule, although so long and clearly settled, appears to have been entirely overlooked in the case of *Omerod v. Hardman*, before the Duchy Court, reported in 5 Ves. jun. 722; but this case can by no means be considered as an authority, and has been expressly denied by Lord Eldon; 6 Ves. jun. 654.

## II. OF PERSONAL CHATTELS.\*

n. Query, however, whether the case of *Omerod v. Hardman* was not thought to be within the principle stated before, because to hold that he is liable to see the legacies paid would in fact involve him in the account of the debts, as they must be first paid, *Jebb v. Abbott*, and *Benyon v. Collins*, *Butler's n. to Co. Litt.* 290. b. s. 12; and *Rogers v. Skillicorne*, *Ambl.* 188; and where the whole money has been raised, the heir or devisee will be entitled to the estates unsold, and the creditors or legatees will have no remedy against the same, because the estate is debtor for the debts and legacies, but not for the faults of the trustees; *Anon. in Dom. Proc.* 1 *Salk.* 153.

5. And for the same reason the purchaser is of course not bound to see that only so much of the estate is sold as is necessary for the purposes of the trust.

6. But, although there be no specification of the debts, yet a purchaser must see to the application of the money where there has been a decree, as that reduces it to as much certainty as a schedule of the debts. In such cases, therefore, the purchaser should not pay to the trustees, but must see to the application, and take assignments from the creditors; otherwise he should apply to the Court that the money may be placed in the bank, and not taken out without notice to him; the reason of which is that it is at his peril; *Lloyd v. Baldwin*, 1 *Ves.* 173.

7. It is the general opinion of the profession that, when the time of sale is arrived, and the persons entitled to the money are infants, or unborn, the purchaser is not bound to see to the application of the money; because he would otherwise be implicated in a trust, which in some cases might be of long duration.

8. But if an estate is charged with a sum of money for an infant, payable at his majority, and there is no direction to appropriate the money, a purchaser cannot safely complete his purchase, although the money be invested in the funds as a security for the payment of the legacy to the infant when he shall become entitled; for, if in the event the fund should turn out deficient for payment of the infant's legacy, he must still have recourse to the estate for the deficiency. And it should seem that even a court of equity cannot, in a case of this nature, bind the right of an infant; *Dickenson v. Dickenson*, 3 *Bro. C. C.* 19.

9. It appears to be thought by the profession that, although the trusts are defined, yet that payment to the trustees is sufficient wherever the money is not merely to be paid over to third persons, but is to be applied upon trusts which require time and discretion, as where the trust is to lay out the money in the purchase of estates.

10. So, where the trust is to lay out the money in the funds, &c., upon trusts, if the purchaser see it invested according to the trust, and procure the trustees to execute a declaration of trust, he is in practice considered as discharged from the obligation of seeing to the further application of the money; *Sug. V. & P.* 374. It is, however, incontrovertibly settled that a purchaser of personalty shall in no case be bound to see to the application of the purchase money, where he purchases *bona fide*, and without notice that there are no debts; *Elliot v. Merryman*, *Barnard. Rep. Cha.* 78; 2 *Atk.* 41; *Watts v. Kancie*, *Toth.* 141; *S. C.* *Ibid.* 227. by the name of *Mutts v. Kancie*, and *Nurton v. Nurton*, *Ibid.*

\* A contract for sale and purchase is an agreement for the transmutation or conveyance of property to another, in consideration of an equivalent actually paid, or intended to be given, by the vendee. When such an arrangement is made for the purchase of a specific commodity *in esse*, and set apart and kept distinct from other goods, the property is changed immediately upon the making of the contract; so that, upon tender of the price, the purchaser has a right to the delivery of the particular commodity; but in the case of a contract to manufacture an article which is not in existence at the time of the or-

der being given, the purchaser, though he pays the whole value in advance and the other proceeds to execute the order, acquires no property in the chattel till it is finished and delivered to him; 1 Taunt. 318. Hence, if the commodity sold be not finished, or be not severed from the bulk of the merchandize of which it is a component part, or if any act remain to be performed to perfect the thing sold, then no property passes by the bargain till the article has been delivered. If, however, the vendee pay the full price of a manufactured article in advance, the contract is then executed by him, and executory only on the part of the vendor, and an indefeasible property in the thing sold vests in the purchaser. This virtual change of property may also occur where the parties enter into a special contract, which authorizes the vendee to take immediate possession of the subject matter of the agreement, and a future day is appointed for the payment of the purchase money; for he may, without payment, if he continue solvent, insist on the performance of the stipulation and the delivery of the commodity purchased; though, if he be in embarrassed circumstances, to vest in him an absolute indefeasible property, the thing sold must actually come to his hands, otherwise the vendor has a right to stop them *in transitu*. If credit be given by the vendor as a voluntary act, posterior to, and not constituting any part of the original contract, it may at any time be revoked; but if the vendor, being entitled to demand immediate payment, take a bill payable at a future day, he cannot commence an action for the original debt until the stipulated period expires, provided the bill be a valid security. Hence in *Stedman v. Gooch*, 1 Esp. 5. it was decided, that taking a bill drawn by a party who had no effects in the hands of the drawer was of no avail. There is no particular ceremony required for transferring property by way of sale from one person to another. It may be effected either by a formal written agreement, or by a mere verbal contract, subject only to such regulations as are required by statute. The most important legislative enactment, connected with this subject, is the statute against frauds. Prior to the introduction of that act, 29 Car. 2. c. 3. s. 17. it was rarely essential that a contract for the transfer of personal property should be in writing, except in the case of bills of exchange. This power of making verbal agreements created much litigation and uncertainty, and involved the transactions of the commercial world in many inextricable difficulties. The 17th section of the statute provides, "that no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum, in writing, of the said bargain be made and signed by the parties to be charged by such contract, or their agent thereunto lawfully authorized.

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We have formerly observed that no agreement could be valid when contrary to public policy, to the principles of morality, or in contravention of any particular statute. These rules, of course, apply to contracts of sale and purchase. From the nature of a contract of sale, it is obvious that when once entered into it cannot be rescinded by either of the contracting parties, without the consent of the other. But though this is the general rule of law, a distinction is to be found in the old books as to sales bound by earnest; in such case, the law appears to have been that, if the buyer repented of his bargain, he was excused from fulfilling it upon forfeiting to the vendor what he had given by way of earnest. But the law is now altered; that, where a sale has been legally constructed it cannot be rescinded but by the mutual consent of the contracting parties, or by virtue of an agreement in the original contract, empowering one or both of them to abandon it; 1 T. R. 133. But where some acts is to be done by each party under an agreement of sale, and the vendor, by neglecting his part, prevents the vendee from carrying the contract into execution, this is a just and reasonable cause for rescinding the contract; *Giles v. Edwards*, 7 T. R. 181. So, upon a bargain for the sale of goods, if the vendee do not come and pay for them, and take them away in reasonable

[ 315 ] THIRD. OF THE CONSIDERATION REQUISITE TO CREATE THE RELATIVE SITUATIONS OF VENDOR AND PURCHASER.\*

time after request, the vendor may elect to consider the contract as rescinded, and resell the property. But a contract cannot be rescinded by one party for the default of the other, unless both parties can be put identically in the same situation. Whenever a party seeks to recover back money paid on a contract which has been rescinded, the original contract must be proved, and its abandonment established; and in no case will a party be allowed to recover back money so paid, or to maintain an action in contravention of such agreement, unless the original contract has been completely rescinded. The rules on this subject have been illustrated under title "Money Had and Received." When the contract of sale is complete, the parties have mutual remedies; the one for the payment of the price, and the other for the delivery of the things sold. In the former case, the remedy usually resorted to is an action of debt or *assumpsit* to recover the price, under a declaration for goods sold and delivered, or goods bargained and sold, as the case may be. In actions for goods sold and delivered, where the delivery has been to a third person, it frequently becomes a question whether the goods were sold to the vendee as agent for such third person, or to the vendee on his own account, and delivered to the third person as his agent or servant. The merits in such cases always depend upon the question of fact to whom the credit was originally given. But if the person for whose use the goods are furnished be liable at all, any promise by a third person to pay for them, whether made before the delivery or after, must be in writing, otherwise it is void under the statute of Frauds; see *ante*, Guarantee; and therefore as in *Watson v. Wharms*, 2 Atk. 80. where a man gave a verbal order in these words, "You must supply A. B. with bread, and I will see you paid," no action laid against him for the bread supplied. So, if a tradesman deliver goods to A. at the request and on the credit of B. who says before the delivery "I will be bound for the payment of the money as far as 800*l.* or 1,000*l.*;" if it appear that the credit was given to A. as well as B. the promise is void, not being in writing, such undertaking of B. being merely a collateral promise. But where the goods have in fact been sold to A. and on his credit though delivered to B.; debt or *assumpsit* for goods sold and delivered may be maintained against A., the delivery to B. being in point of law a delivery to the vendee, though in such cases it is usual to state in the declaration that the goods were delivered to B. Where there is a collateral undertaking in writing to pay for goods sold to another, such undertaking must be enforced by a special action of *assumpsit*, stating the particular circumstances of the promise, and not by a general *indebitatus assumpsit* for goods sold and delivered to the defendant, or for goods sold to the defendant and delivered to another at his request. Where there has been no actual delivery of the goods, it is proper to declare for goods bargained and sold, only omitting the delivery. In such an action defendant cannot be holden to bail.

\* The general rule is, that it is essential to the validity of a simple contract or agreement not under seal that it should be founded on consideration; and that, if it be merely voluntary or gratuitous, without consideration, the agreement is *nudum pactum*; that a deed of security under seal is binding on the party by whom it is executed, although there was no consideration for making it, though it will be invalid in some cases in equity, unless it be founded on a sufficient consideration, so far as it interferes with the rights of creditors, or of purchasers claiming for valuable considerations. The consequences of the want of consideration are that, where the agreement is not under seal, no action or suit can be maintained upon it; and that, if the object of it be to transfer personal property, possession of the chattel must be delivered to make the transfer valid, for a gift of personal property; by an instrument not under seal is invalid, unless perfected by delivery; *Irons, v. Smallpiece*, 2 B. & A. 551; *Bunn v. Markham*, 2 Marsh 532; 7 Taunt. 230; 4 Bar. & Ald. 650; and cases there collected. As to the subject of matter the contract,



FOURTH. OF THE MODE IN WHICH A CONTRACT OF SALE IS CONSTRUED.\* [ 316 ]  
 FIFTH. OF THE EFFECT OF THE RELATIVE SITUATION OF VENDOR AND PURCHASER BEING CREATED.

(A) AS REGARDS THE VENDOR.

1st. Of his rights.

(a) Of his lien on the goods for the price.†

(c) To compel specific performance of the contract of sale.‡

there is no restriction, provided the contract be not against the policy of the common law, or the provisions of the statute law, which we have before considered when examining the legality of contracts. There is no limit to the stipulation that may be made between individuals: it may be for the past, the present, or the future, as such a thing has, or has not, been done, Com. Dig. Covenant, a. ; 1 Plowd. 308; that such a thing does or does not exist at the time of the bargain, as in the case of a warranty; or that something shall or shall not be thereafter done; Com. Dig. Covenant, a. 1; F. N. B. 146. A. It would be endless to attempt to enumerate all the various bargains that may be entered into between individuals.

\* An agreement for sale and purchase being a contract for the transmutation of property to another, in consideration of a sum of money actually paid or intended to be so by the vendee, it belongs to that class of contracts termed in the civil law *do et des*, see Ross on Vendors and Purchasers; and when such a bargain is made for any specific commodity, set apart and not intermixed with other goods, the property is changed immediately upon the making of the contract, so that upon tender of the price the purchaser has a right to the delivery of that particular article, 1 Taunt. 320; whereas, in case of a contract to manufacture an article, we have seen that, until completed for delivery, no property passes, although he manufacturer has received the full price of the article. But if the commodity sold be not finished, or be intermixed, and not separated from the bulk, or if any thing in measuring or weighing remains to be done, then no property passes by the bargain till the article is delivered; 5 Taunt. 575. The property may be changed, though no actual delivery be made to, or possession be not obtained by, the vendee until the fulfilment of the stipulated terms: thus, if a man sells his horse for money, though he may keep him until he is paid, yet the property of the horse is by the bargain vested in the bargainor or buyer; so that if he presently tender the money to the seller, who refuses it, he may take the horse, or have an action of *detinue* or *trover*; and if the horse die in the vendor's stable between the bargain and delivery, still he may have an action of debt for the money, because by the bargain the property was in the buyer; 7 East, 571. But although the property is bound by the bargain, yet where part of the money only is paid by way of earnest, and whenever a sum is given as earnest or as a deposit, it is to be deemed part of the price unless there is an express stipulation to the contrary, 1 Saund. 320. the property does not seem to

† A vendor of property has a particular lien upon it, as long as it remains in his possession, and no constructive delivery has taken place, and the vendee neglects to pay or tender the price agreed upon for it. If the vendor of the goods unconditionally delivers the whole of the goods sold, he is divested of his lien upon the whole; *Owenson v. Moore*, 7 T. R. 64; abridged *ante*, tit. Lien, vol. xii. p. 285. But, in general, the parting with possession of part of a quantity of goods will not deprive a party of his lien in the residue; see *ante*, vol. xii. p. 286.

‡ The rules adopted by courts of equity on this subject of entertaining suits to enforce the performance of contracts between vendor and purchaser have been already pointed out. In the notes devoted to that subject we have seen that the Court of Chancery will not in general entertain a bill for the specific performance of an agreement for the sale of personal property; see *ante*.

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(d) *To an action at law for the non-performance of the contract.\**

1. ALEXANDER V. OWEN. E. T. 1786. K. B. 1 T. R. 225.

When  
goods are  
delivered  
under an  
agreement

On a motion to set aside a nonsuit it appeared, that the plaintiff had bargained to sell to the defendant, who lived at Manchester, a quantity of tobacco, the value of which, in addition to a former debt of 23*l.* for some other tobacco, amounted to 50*l.* It was agreed at the same time between the parties,

be absolutely transferred; for, if the party giving earnest neglect to complete the contract within a reasonable time after request made to him for that purpose, the bargain is dissolved, and the vendor may dispose of it; 3 Campb. 426. It was holden that where A. having proposed to sell goods to B. gave him a certain time at his request to determine whether he would buy them or not, B. within the time determined to buy them, and gave notice thereof to A., yet A. was not liable to an action for not delivering them, because B. was not bound by the original contract, and therefore there was no consideration to bind A.; 3 T. R. 653; but that doctrine has been considerably qualified by modern decisions, which establish that if a proposed vendor engage by letter at a distance to give a time to a proposed purchaser to decide on having a commodity at a named price, and the latter by letter agrees to the price within the time, the vendor is bound by the bargain; 16 East, 45; 1 M. & S. 21; 1 B. & A. 681. If on an agreement for the purchase of goods the vendee pay the whole price in advance, here the contract is executed by him, and executory by the vendor, and an indefeasible property in the thing sold vests in the vendee, 1 Taunt 318; 1 Atk. 285; and this virtual change of property may occur when the parties enter into a special contract or agreement, which from its terms allows the vendee to take immediate possession of the thing sold, and especially in those contracts where a day is appointed for the payment of the purchase-money, and in these cases the contract is good immediately, and an action lies upon it by the vendee without payment, provided he be solvent; but in this case, to vest an absolute indefeasible property in the thing sold must have actually come to the hands of the vendee, for otherwise the vendor has a right to stop them *in transitu*, upon non-performance of the contract on the part of the vendee or his insolvency. If credit be given by the vendor as a voluntary act subsequent to, and not making any part of, the original contract, it may at any time be revoked, 1 Esp. 430; though, if the vendor, being entitled to demand immediate payment, take a bill payable at a future day, he cannot commence an action for the original debt until that period expires, if that bill is valid security; 1 Esp. 5.

When a contract for the sale of goods is completed by the assent of both parties, the property in the goods is so far transferred to the vendee as to give him a complete right to them on the payment of the price agreed upon; but he cannot take the goods until the payment of the price to the vendor. If he tender the price, and the vendor refuse it, the vendee may seize the goods, or have an action against the vendor for detaining them. The payment of part of the price by way of earnest will also vest the property in the thing sold; thus, if a man sell a horse to another and receive part of the price, and the horse die while in the possession of the vendor, before delivery to the vendee or payment of the remainder of the purchase money, still the vendor is entitled to the payment of the price, because the payment of the earnest is a part performance of the contract, and vests the property in the vendee; 2 Bla. Com. 448. The payment of earnest, however only binds the bargain, and does not determine the right of the vendor to demand payment of the price by the vendee before he parts with the goods, unless it has been agreed upon between the parties that a certain time shall be given for payment; 5 T. R. 409. If a man offer money for goods in a market, and the seller agree to take the offer, and while the buyer is telling out his money as fast as he can, the seller sells the goods to another, the buyer may upon payment, or tender, or refusal of the price agreed upon, take the goods.

\* Under this general head and division of vendor and purchaser, it will be superfluous

that the plaintiff should take in payment of that debt a quantity of copper [ 318 ] halfpence, which were made up in crown papers, in each of which were no more than five pennyworth of good half-pence, and it was also agreed that, if the amount of the copper should exceed the value of the tobacco, some more of the latter should be sent to balance the amount. Part of the tobacco was delivered, but the plaintiff refused to send the remainder unless the defendant would pay for the whole in good money. Several samples of this copper were shown to the plaintiff at the time of the agreement, who said it would pass very well at Liverpool, where he lived. The copper was accordingly sent to the plaintiff on the 19th of July, and on the 30th August the defendant wrote a letter to the plaintiff refusing to take it back, in answer to a letter of his of the 28th of the same month, complaining of the badness of it, and refusing to accept it. It also appeared that, before the writing of this letter, the parties had corresponded on the subject; but the copper was not actually returned till November. *Per Cur.* It has been objected that this is an illegal contract; there is no doubt but an agreement to take counterfeit money, knowing it to be so, is void; but the fact does not come up to it in this case. The plaintiff did not agree to take counterfeit money in payments, but the agreement was to take such copper money as was then shown to him.

Supposing however, that this contract was illegal, the plaintiff would not stand in a better situation. He could never recover, for the argument of the plaintiff's counsel, in case an action had been brought by the defendant to recover the remainder of the tobacco, would have been equally applicable to the plaintiff. It cannot be said that the sale is good, and that the payment is bad; if it be an illegal contract, it is equally bad for the whole. It would be a great injustice to allow the plaintiff to recover in this action the whole value of the goods sold, because that would be permitting him to take advantage of a corrupt agreement, which is never allowed in cases where a party applies to the Court to set aside such agreements.

to advert to more than the general principles of law; as the particular rules and distinctions have necessarily been noticed and will be found under their appropriate titles, as Goods Sold and Delivered, Goods Bargained and Sold, Auction, &c. &c. In general the vendor of personal chattels must bring his action, either on the special contract of sale or for the price of the goods. The form of action is necessarily governed by the nature of the contract: if the agreement be under seal, the action must be debt or covenant; if not by deed, the action may be by debt or assumpsit. In an action for not accepting goods, the vendor must be prepared to show the contract of sale, performance of all conditions precedent, and the amount of damages. The contract must of course be in writing, when so required, by the Statute of Frauds, see ante, tit. Frauds, Statute of; and be duly stamped when requisite; see ante, tit. Stamps. If the goods were to be delivered at a particular place, a tender there, or that which is equivalent to a tender in point of law, must be proved, as that the defendant dispensed with the necessity of a formal tender, by a refusal to complete his contract; *Glazebrook v. Woodrow*, 8 T. R. 366; *Jones v. Berkly*, Doug. 687. It is incumbent on the vendor to show that the goods correspond with the description in the contract. If they be described in the sale not as of a particular quality, it is not sufficient to show that the quality, though inferior to that described, correspond with a sample previously delivered; *Tye v. Fynnmore*, 3 Camp. 462; see also *Haydon v. Hayward*, 1 Camp. 180; post, tit. Work and Labour. In an action for the price of goods sold by sample, it is necessary to prove that they corresponded with the sample at the time of the sale, *Hibbert v. Shee*, 1 Camp. 113; it is not sufficient to prove a usage of trade, where samples are drawn without fraud, for the buyer to take the goods and receive a compensation for the difference, *Ibid.* On an agreement to purchase 300 tons of Campeachy logwood; of real merchantable quality, at 35*l.* per ton, and that such as might be determined to be not of real merchantable quality might be rejected, it was held that the vendee was bound to take so much as was of the sort described, at the contract price, although 16 out of 300 tons were not Campeachy logwood; *Graham v. Jackson*, 14 East, 498.

\* When no time is specified for payment in the contract of sale, the money is demandable immediately upon the delivery of the goods, but both the mode and time of payment are subject to whatever particular stipulations the parties may choose to agree upon. Where one agrees to deliver a commodity at a certain price in a limited time, he cannot demand payment till the whole commodity is delivered; for an entire contract cannot be apportioned; *Waddington v. Oliver*, 2 B. and P. 61; and see *Walker v. Dixon*, 2 Stark. 231. So, in cases where the plaintiff undertakes to do some particular and entire act, he cannot recover payment for a proportionate part of the work and labour bestowed in the

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And if goods are sold to be paid for in ready money, the vendor should not deliver the whole of them without payment; if he does, he waives the mode of payment stipulated for.\*

Where a purchaser orders several articles at the same time, though at separate prices he may, it seems, consider the contract as entire, and refuse to accept some of the articles without receiving the rest.†

## 2. WARWICK v. NOAKES. E. T. 1790. Peake, 67.

The plaintiff was a hop-merchant, and the defendant his customer, living at S., in D. The plaintiff sold him hops; and also sold hops to several other persons in that neighbourhood, and requested the defendant (as his friend) to receive the money due to him from his other customers, and to remit him by the post a bill for those sums, and also the money due to him from the defendant himself. A bill was accordingly remitted, but the letter got into bad hands, and the bill was received by some third person at the banker's on whom it was drawn. Lord Kenyon. As the plaintiff in this case directed the defendant to remit the whole money in this way, it was remitted at the peril of the plaintiff. The plaintiff was nonsuited.

## 3. CHAMPION v. SHORT. E. T. 1817. 1 Campb. 53.

The purchaser of lands took the growing crops at a valuation, and the purchaser entered, but the vendor could make no title to the land; it was held, that the contract being entire, he could not maintain *indebitatus assumpsit* for the crops; Neal v. Veney. See 1 Campb. 471.

performance of such entire contract, but must proceed for the whole, even though the work has been by some accident destroyed before, or he has been prevented by his employer from finishing the remainder of his work, Gaudell v. Pontyny, 4 Campb. 375; and this right, like all other mercantile claims may be controlled by particular usages; as where the plaintiff sought to recover the reward of his labour in printing certain works which had been consumed by fire before delivery to the defendant, it was held that he could not recover, because the usage of trade was proved to be that a printer is not to be paid for any part of his work until the whole is completed and delivered; Gillot v. Mawman, 1 Taunt. 187.

\* But it is no waiver of the vendor's right to be paid for goods sold on delivery, that he allowed part of them to be carried away without being paid for, and he may refuse to deliver the remainder without payment; Payne v. Shodbolt, 1 Camp. 427. If credit be given by the vendor or other contracting party as a voluntary act subsequent to, and not making any part of the original contract, it may at any time be revoked; De Symons v. Minchwich, 1 Esp. Rep. 430. But though by the terms of the contract a party is entitled to demand immediate payment, if he take a bill of exchange, or check upon a banker payable at a future day, he cannot sue upon the original consideration until the expiration of the time which such bill or check has to run, and he has used due diligence to obtain the payment of such bill or check, provided such security be a valid and good one; and even an extent in aid on behalf of the crown cannot be issued against a person from whom the principal debtor has taken a bill, Stedman v. Gooch, 1 Esp. N. P. C. 5; 3 Taunt. 180; 4 Esp. 80; which is not due; Rex v. Dawson, Wightw. 32. If, however, the bill or check should be ascertained to be a void or invalid security, as where the drawee is insolvent; Brown v. Karsley, 2 B. and P. 518; it is not considered as a payment, and the vendor may resort to his original debt and contract; that is where the security was accepted as an indulgence to the vendee, and not in consequence of a contract for credit at the time of the contract, in which latter case the vendor must wait till the time of the credit expires, even though the bill agreed to be given in the mean time be waste paper; Bishop v. Shillito, 2 B. and A. 329; and see 4 Taunt. 288.

† So, it has been held, that a purchaser of two houses in distinct lots at an auction, may refuse to take one if no title can be made to the other; Chambers v. Griffiths, 1 Esp. C. 50. But query, for where different lots are bought at an auction, the agreements are separate and cannot be declared on as one contract; James v. Shore, 1 Starkie's C. 426; and see Poole v. Shergold, 2 Bro. C. C. 118; 1 Cox, 273; S. C. 6 Ves. 726; Sugden's Treatise 5th Edit. 247. On the other hand where an agent for the sale of horses, sold to A. in one lot, and at an entire price a horse belonging to A. and also a horse belonging to B., warranting both to be sound; it was held that A. could not maintain *assumpsit* against B. for the unsoundness of the horse belonging to him, declaring as upon a sale of that horse, for the contract is entire; Symonds v. Carr, 1 Campb. 361; Hort v. Dixen, Selw. 101. Where the plaintiff sold sixty coombs of rye to the defendant, at 14s. per coomb, to be delivered at or before Michaelmas, and the money to be paid on the delivery of the last rose, and the proof was that fifty coombs were delivered before Michaelmas, it was held that, though the agreement was entire for sixty coombs, yet that the parting it in delivery made it in the nature of several contracts; for the one party sent it in and the other accepted it, in pursuance of their agreement, and that if no other contract could be proved it should be understood to be a partial agreement as to the fifty coombs; for the subsequent acts of the parties so expounded their contract, that it should be understood that the rye might be delivered by parts, Gib. L. Ev. 181. cites trials per Pais, 400; and where the plaintiff sold to the defendant one hundred sacks of flour, at 94s. 9d. per sack, and the plaintiff delivered part, but refused to deliver the residue, the Court of King's Bench

## 4. PEENAM V. PALMER. Gilb. Ev. 194.

The defendant bargained and sold to the plaintiff 100 quarters of barley, to be delivered between harvest and candlemas where the plaintiff should appoint, at 16s. per quarter, and 2s. 6d. was paid at the bargain, and the residue to be paid at the times of delivery, according to the quantity; and upon the delivery of nineteen quarters and a half (which were delivered for twenty quarters) the plaintiff paid 10*l.* only, but afterwards paid the other 6*l.* before action brought: it was held by Parker, C. J. that an action was maintainable for non-delivery of the residue; for delivering nineteen quarters and a half without full payment was a dispensation by the defendant as to that quantity, and this did not excuse him from a delivery of the rest according to the agreement.

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But if he accept one singly he severs the contract, and cannot object to receiving another of the remaining articles.

## 5. BEXWELL V. CHRISTIE. H. T. 1776. K. B. 1 Cowp. 395.

Per Lord Mansfield. It is fraudulent to give such a false description of the goods in the catalogue of the sale as is likely to enhance the price, as by falsely describing them in the catalogue to be "the property of a gentleman deceased, and sold by order of his executor."

A false description of the goods sold;\*

## 6. HILL V. GRAY. 1815. N. P. 1 Stark. 434.

The plaintiff's agent sold a picture to the defendant as a Claude, refusing to disclose the name of his principal, but knowingly suffered the defendant to buy the picture, under the impression that it was the property of another person. Lord Ellenborough held, that the sale was void through fraud, even though the picture were a real Claude.

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As describing a picture to be the property of a particular person; Or concealing the fact of a notice to re-enter having been given, will vitiate the contract.†

## 7. STEVENS V. ADAMSON. 1816. N. P. 2. Stark. 429.

A tenant sold his interest in the premises by auction, without informing the vendee that the landlord had, the day before the sale, given notice of re-entry according to the terms of the lease if the premises were not put in repair within three months, and the vendee was afterwards ejected; it was held to be fraudulent concealment, and that the vendee was entitled to recover his deposit from the auctioneer.

is said to have held (contrary to the decision at *Nisi Prius*) that the vendor was entitled to recover for the part delivered; *Walker v. Dixon*, 2 Starkie's C. 281.

\* Fraud, illegality, or misrepresentation, is generally a good defence to an action by the vendor against a vendee, and this rule obtains even where a bill is given for the price of goods, a total or even a partial failure, from the fraud of the vendor is a bar to the action, *Lewis v. Cosgrave*, 2 Taunt. 3; provided the vendee has repudiated to contract; *Ibid.* Secus, where he affirms it by retaining a part of the consideration, *Attibber v. Bamford*, 3 Starkie's C. 175. So, where the estate was described to have lately undergone a thorough repair, whereas it was in a complete state of ruin, and ordered to be pulled down by the district surveyor; *Loyes v. Rutherford*, K. B., May, 1809; *Sugden's Treatise*, 278; but see *Belworth v. Hassell*, 4 Campb. 140. If an annuity be subject to redemption, the purchaser is not bound to complete his contract, if the auctioneer do not describe it as redeemable; *Coverley v. Burrell*, 5 B. and A. 287. But it seems that if a public act authorising the payment of money by annuities make them redeemable, such a notice would be unnecessary; *Coverley v. Burrell*, 2 Starkie's C. 295. Where the estate is described to contain a specified number of acres, it seems in the first place that this must be understood of statute, and not of customary measure, unless they be so described; *Wing v. Earl*, Cro. Eliz. 267; *Noble v. Derrell*, 3 T. R. 271; *Hockin v. Cooke*, 4 T. R. 314; *Master of St. Cross v. Lord Howard de Waldor*, 6 T. R. 388; and that it would be a good defence at law to show that the estate did not contain the stipulated quantity of land. But if the estate be described as containing so many acres by estimation, be the same more or less, or by words to that effect, it seems that a small variance would not be material in the absence of fraud; *Day v. Fyfe*, Ow. 33; *Sugden's V. and P.* 281.

† And where a lease, containing the usual covenants to repair, is sold by auction, if any of the demised buildings have been pulled down before the sale, the vendee may rescind the contract, although the buildings pulled down be not described in the particulars of sale; *Grainger v. Worms*, 4 Campb. 83. And although the conditions of sale provide that a mistake in the particular shall not vitiate the contract, the stipulation does not extend to a wilful misdescription calculated to enhance its value; *Duke of Norfolk v. Worthy*, 1 Campb. 340; and see *Schneider v. Heath*, 3 Campb. 506. But it seems that where a vendee knows the description to be false, he cannot take advantage of it either at law or in equity; *Dyer v. Hargrave*, 10 Ves. jun. 505. But he may sue upon an express warranty. The purchaser of goods by sample has a right to inspect the whole of the bulk for the purpose of comparison; and if the vendor refuse such inspection it is a good defence to the action;

The vendor by request-  
ing the ven-  
dee to sell  
the goods  
for him  
waives the  
contract.\*

[ 322 ]  
Negligence  
on the part  
of the ven-  
dor is a  
good de-  
fence to an  
action  
brought by  
him.

The owner  
of property  
is compe-  
tent either  
to affirm or  
disaffirm a  
sale by him-  
self in an  
action be-  
tween other  
parties.†

# 8. GOMERY v. BOND. T. T. 1817. K. B. 3 M. & S. 378.

The vendor of goods, on the vendee's objecting to their quality, and refusing to accept them, requests the vendee to sell them for him; the Court held this is evidence of a waiver of the contract, and the jury cannot take into their consideration whether, in making that request, the vendor mistook the law. See *Belbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143.

# 9. CLARKE v. HUTCHINS. T. T. 1814. K. B. 14 East, 475.

A vendor receives an order to forward goods to the vendee at another sea port by a common sea carrier, who notoriously has limited, his responsibility as to parcels of a certain value; the Court held it the vendor's duty to enter the goods and pay for them accordingly, in order to insure the responsibility of the carrier for the safe delivery; and if the goods be lost in consequence of neglect to do so, the vendor cannot recover the price.

# 10. NIX v. CUTTING. H. T. 1814. C. P. 4 Taunt. 18.

An action of trover for a horse. A witness was allowed to prove that the plaintiff agreed that the witness should take the horse as a security for 15*l.* deposited by the witness with the plaintiff, and that the horse should be sold at the next Woodbridge fair, if the money was not paid in the mean-time, and that the witness sold him to the defendant at that fair, the money not having been paid.

*Longmer v. Smith*, 1 B. and C. 1. n.; the payment in this case was to be made by a banker's bill, and an usage to permit the inspection of the bulk was proved; but the Court intimated that the purchaser had a right, independent of any particular usage, to inspect the bulk, and that the contract was wholly rescinded; *ibid.*

\* A contract of sale cannot be rescinded by the act of the parties, where the rights of third persons have intervened; *Smith v. Field*, 5 T. R. 402.

† A witness who is answerable to a vendee, in case the title turn out to be defective, is not competent to support the title in an action against the vendee founded on an alleged defect of title; 2 Roll. Ab. 685; Str. 445. In the case of *Briggs v. Crick*, 5 Esp. C. 99. cor. Lord Alvanly, it is stated to have been ruled that the original vendor of a horse, with a warranty of soundness, was a competent witness to prove the soundness in an action against his vendee on a similar warranty, on the ground that there was no direct interest, and that although the horse might have been sound when sold by the witness, yet unsound when sold by the defendant. But the principle of this decision appears to be dubious; for, unless the testimony as to the unsoundness at the time of the former sale tended to prove soundness at the time of the latter sale, it would be irrelevant. If, on the other hand, his testimony of the soundness at the time of the first sale tends to prove the soundness at the time of the second, then the witness seeks to establish a fact, in which, if he failed, damages would be recovered, to which he would, it seems, be liable on negating the fact which he attempted to prove, viz. the soundness at the time of the first sale; *Lewes v. Peake*, 7 Taunt. 153. 1667. But one who has sold an inheritance, without any covenant for good title or warranty, is competent to prove the title of his vendee; *Bushy v. Green-slate*, Str. 445. In an action between the assignees of Greaves, a bankrupt, and a purchaser from a judgment creditor, who had taken the goods in execution, it was held that a witness was competent to prove, on the part of the defendant, that he, being the owner of the goods, had contracted with a bankrupt for the sale, and had given him a delivery-order, merely to enable him to take home the oil, and inspect it in bulk; and that it was expressly stipulated that the bankrupt should not sell the oil until the witness had been paid by a good bill; *Ward v. Wilkinson*, 4 B. & A. 410.

It has been held, that in an action for goods sold to the defendant, and delivered to A. B. at his request, A. B. is not a competent witness for the plaintiff without a release; *Wright v. Wardle*, 2 Camp. 200. The competency of A. B. was contended for on the ground the plaintiff, after bringing that action could not resort to A. B., and Lord Ellenborough was at first inclined to admit the testimony, but afterwards, it is stated, deemed a release to be necessary, on the ground that the witness might have misled the plaintiff, and might still be liable in case of detection. But query, whether the first impression of that very learned judge was not the correct one, and whether, upon general principles, fraud is to be presumed in order to gain an exception to the competency of a witness; *Rex v. Newland*, East, P. C. 1001. And one who has purchased goods in his own name is not, it has been held, a competent witness for the plaintiff to prove that he acted merely as agent to the defendant; *M'Brian v. Fortune*, 3 Campb. 317. Lord Ellenborough said, "I do not think he can be examined, either on the ground that he is a necessary witness, or that he stands indifferent between the parties. If he was the agent of the defendants, there is no reason why this circumstance should not be proved by other evidence." Yet it seems that an agent is competent to prove his own authority; *Hiderton v. Atkinson*, 7 T. R. 480. Thus he has a clear interest without any counterbalance in the event of this action. If it suc-

## (B) AS REGARDS THE PURCHASER.

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## 1st. Of his rights.

(a) As to the possession of the goods in general, and when sold under a contract of sale or return.\*

(c) To action against vendee for not completing the contract.†

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1. COOK v. OXLEY. E. T. 1790. K. B. 3 T. R. 653.

The engagement to sell and purchase must be mutual.

This was an action upon the case; and the third count in the declaration upon which the verdict was taken stated that on, &c., a certain discourse was

ceeds, the verdict would be evidence for him in an action against himself, to which he is prima facie liable. The remedy which it is supposed he would have against the defendants, if he were to be sued on his contract, cannot be thought to render it a matter of indifference to him whether the plaintiff shall succeed in this action, or be driven to sue him as the real purchaser of the goods; he is not in the situation of a broker, for a broker buys and sells in the name of his principal, and has no personal liability to be discharged by the effect of his evidence. But in the case of *Evans v. Williams*, cited 7 T. R. 481. Lord Kenyon held that the captain of a ship was competent to prove that the money which the plaintiff sought to recover was borrowed for the use of the defendant's ship, and not for his own; and that, as the owners would have a remedy over against him, he stood indifferent; and see *Parker v. Busher*, 1 Starkie's C. 27.

Where, in an action for fitting up a house, the owner was called by the plaintiff to prove an agreement between the owner and the defendant, that the latter had agreed to execute the work for a certain sum, Lord Kenyon held that he was incompetent; *New v. Chidgley*, Peake's C. 98. Yet if such agreement in fact existed, the witness would be liable to the defendant for at least the value of the work. It is true that it might be more difficult for the defendant than for the plaintiff to recover from him; *Buckland v. Tankard*, 5 T. R. 578. But the principle of that decision appears to be dubious; see Lord Ellenborough's observations in *Birt v. Kerkshaw*, 5 East, 461. where he says, "I know of no other case than *Buckland v. Tankard*, which goes on the ground of more or less difficulty in the witness in establishing his interest against one or the other of the parties." A witness proved to be a co-partner with the defendant is not competent to defeat the action by evidence that the goods were sold to himself, and that the defendant was merely his servant; for the effect is to discharge himself of a moiety of the costs; *Goodacre v. Braeme*, Peake's case, 174; *Cheyne v. Kooops*, 4 Esp. C. 112; *Young v. Bairner*, 1 Esp. C. 103. To raise this objection, the partnership must either be admitted or proved; *Birt v. Hood*, 1 Esp. C. 20; but he may be rendered competent by a release; *Young v. Bairner*, 1 Esp. C. 103.

\* See ante, p. 313. where the law on the subject of delivery and possession of chattels sold to a vendee has been collected. It frequently happens that sales are completed upon conditions which are entered into prior to the sale: thus, if an agreement be made for the sale of goods upon the condition, namely, if he like or dislike them upon view when he first has seen them, and agreed or disagreed, approved or disapproved of the goods, the bargain is then complete or void, though he afterwards disagrees or agree to the contrary; *Bro. Cont.* 27; 1 *Rol. Ab.* 449; 1. 22; *Com. Dig.* tit. Agreement, A. 4; *Rit.* 181; *Co. Lit.* 206. b. As to fulfilment and completion of these conditional sales, see 4 *Campb.* 251; 1 *Barn. & Ald.* 681; 16 *East*, 45; 4 *Camp.* 639; 2 *Camp.* 327; 5 *Taunt.* 556; 3 *Camp.* 92. But if the condition be, if he like or dislike the goods at such a day, if he declare his liking or dislike before the day, he may alter it at the day; 1 *Rol. Abr.* 449; *Peake*, 56. Goods are often delivered by one tradesman to another upon what is termed a contract of sale or return: this is a conditional contract for the payment of the price of the goods, unless the same be returned in a reasonable time, *Peake*, 56; and, until that has elapsed, the vendee has no absolute property in the goods, but only a qualified one as bailee; *Ross*, 51, 53; *Willes*, 400; 2 *Campb.* 83; 2 *Taunt.* 176; though, if he should become a bankrupt, as he was the reputed owner; the property will pass to the assignees; 2 *Camp.* 83; 2 *Taunt.* 176; but see 8 *Taunt.* 76.

† The vendee of goods, in an action against the vendor for not delivering the goods according to his contract, must prove: 1st, the contract; 2d, the performance of conditions precedent; 3d, the damage sustained. As it is sufficient in a declaration for not delivering goods on request to aver a request by the plaintiff, and that he was ready and willing to pay the defendant for the same, and a refusal by the defendant to deliver, without averring an actual tender of the price, *Rawson v. Johnson*, 1 *East*, 203; so, a demand of the delivery of the goods sold is sufficient proof of the averment that the plaintiff was ready and willing, *Squier v. Hurst*, 3 *Price*, 68; *Wilkes v. Atkinson*, 1 *Marsh.* 512; although the demand was not made by the plaintiff himself, but by his foreman; *Squier v. Hurst*, 3 *Price*, 68. In an action for the non-delivery of goods, to be paid for by a bill, the plaintiff must prove the tender of a bill; but no evidence on the part of the defendant is admissible to prove that by bill was meant an approved bill; *Hodgson v. Davies*, 2 *Camp.* 530. And even if the contract be to pay by an approved bill, it must be taken to mean a bill to which no reasonable objection can be made; *Ibid.*; and see *Adam v. Richards*, 2 *H. Bl.* 573; *Thirby v. Helbot*, 3 *Mod.* 273.

had, &c., concerning the buying of 266 hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads (at a certain price) whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to, or dissent from, the proposal till the hour of four in the afternoon of that day, to which the defendant agreed, and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant to deliver to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, &c.

Per Buller, J. It is impossible to support this declaration in any point of view. In order to sustain a promise there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract was first made; then as to the subsequent time, the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale at the time when the condition was complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale, or even that the goods were kept till that time.

2. ADAMS v. LINDSELL. T. T. 1817. K. B. 1 B. & A. 681.

A. by letter offered to sell B. certain goods, receiving an answer by return of post, and the letter being misdirected, the answer notifying B.'s acceptance did not arrive so soon by two days as it would have done had A.'s letter been properly directed; it was held that the contract was complete the moment the offer was accepted, and that B. was entitled to recover for breach of contract; see *Humphries v. Carvalho*, 16 East, 45.

3. HUMPHRIES v. CARVALHO. M. T. 1811. K. B. 16 East, 45.

A broker on Saturday sold goods of the defendant's to the plaintiff, at a stipulated price, subject to the plaintiff's approval of the quality on the Monday following, and sent the bought-note to the plaintiff on the Saturday, marked with the words, "quality to be proved on Monday;" but did not send the bought note to the defendant then, because he had met him and informed him of the contract on the same day. The plaintiff not having signified his disapproval of the contract on Monday, the broker sent the sold note to the defendant on Friday with the words "quality approved on Monday" struck out, which note the defendant returned in twenty-four hours, which, by the custom of the trade, signified his disaffirmance of the contract as far as in him lay; held that at any rate the defendant could no longer disaffirm it after Monday.

## VENUE.†

### I. RELATIVE TO IN GENERAL.

#### (A) IN CIVIL PROCEEDINGS.

(a) When local, p. 326. (b) When transitory, p. 326. (c) With regard to matters arising abroad, p. 326. (d) Mode of stating, p. 328. (e) Changing of.

#### 1st. When, or when not, allowed.

\* It is no defence on the part of the vendor, in an action for not loading goods at Peterburgh before a certain day, that the goods had been seized by the Russian government, and that the vessel had put to sea to avoid an embargo; *Splidt v. Heath*, 2 Camp. 54. n. In avoidance of a sale made by a broker, the defendant may prove that, by the custom of the trade, the authority to sell expires with the day on which it is given; *Dickinson v. Lilwal*, 1 Starkie's C. 121; 4 Campb. 279.

† Is the place or county in which the facts are alleged to have occurred, and in which the cause is to be tried. Where there is a choice between two counties, it may be laid in either of two counties in which facts equally essential happened; *Scott v. Brest*, 2 T. R. 241; *Corporation of London v. Cole*, 7 T. R. 583.

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But a writ  
ten answer  
forwarded  
though not  
received  
will suffice  
to make it  
mutual;

Or the con-  
currency  
may be im-  
plied from  
circumstan-  
ces.\*



1. By plaintiff, p. 329. 2. By defendant, p. 329.

2d. Mode of.

1. In King's Bench, p. 331. 2. In Common Pleas, p. 332. 3. In Exchequer, p. 332. 4. In vacation, p. 332.

(f) Bringing back, or retaining of, p. 332.

(B) IN CRIMINAL PROCEEDINGS. See *ante*, tit. Indictment.

- II. RELATIVE TO IN PARTICULAR. See particular titles according to the form of action or subject matter; as Assumpsit; Attorney; Covenant; Debt; Libel; Slander, &c. &c.

## I. RELATIVE TO IN GENERAL.

### (A) IN CIVIL PROCEEDINGS.

(a) When local.\*

(b) When transitory.†

(c) With regard to matters arising abroad.

MOSLYN V. FABRIGAS. M. T. 1774. K. B. 1 Cowp. 160.

Lord Mansfield, C. J. There is a substantial and a formal distinction as to the locality of trials. The substantial distinction with regard to matters arising within the realm is, where the proceeding is in *rem*, and where the effect of the judgment could not be had, if it were laid in a wrong place; as in the case of ejectments, where possession is to be delivered by the sheriff of the county; and as trials in England are in particular counties, and the officers are county officers, the judgment could not have effect if the action were not laid in the proper county; 7 T. R. 587, 588. So with regard to matters that arise out of the realm, there is also a substantial distinction of locality; for there are some cases that arise in the realm which ought not to be tried anywhere but in the country where they arise; as if two persons fight in France, and both happen casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here; because, though it is not a criminal prosecution it must be laid against the peace of the king, but the breach of the peace is merely local, though the trespass against the person is transitory (*sed quare the contra pacem is not traversable*, see 2 Bl. Rep. 1058; Vin. Ab. Contra Pacem.) So if an action were brought relative to an estate in a foreign country, where the question was a matter of the title only, and not of damages, there might be a

Where the cause of action which proceeds from injuries to the person or personal property has arisen in foreign parts it may be laid as arising in England.‡

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\* When the action could only have arisen in a particular county, it is local, and the venue must be laid in that county; for if it be laid elsewhere the defendant may demur to the declaration, 1 Wils. 165; or the plaintiff, on the general issue will be nonsuited at the trial. Such are all real and mixed actions, and actions of ejectment, and trespass *quare clausum frigit*, &c. And an action on the case for nuisance is held to be local in its nature and the nuisance must be proved to have been committed in the county where the venue is laid; 1 Taunt. 379; but see 2 Campb. 8; 1 Bos. & Pul. 225.

† Where the action might have arisen in any county, as upon contracts, it is transitory, and the plaintiff may in general lay the venue wherever he pleases, Gilb. C. P. 84; and see 1 Saund. 74; subject, however, to be changed by the Court if not laid in the very county where the action arose.

‡ Hence all actions of a transitory nature that arise abroad may be laid as happening in an English county; see *ante*, tit. Assault and Battery. In a replication to a plea of *non tenues accouple*, &c. in a writ of dower alleging a marriage in Scotland, it is not necessary to state by way of venue that the marriage was had in any place in England; 2 H. Blac. 145. Nor is it necessary to lay a venue in a plea in abatement that another person ought to have been sued jointly with the defendant; and if it be pleaded that such other person is alive, to wit, in Spain, it will be considered as pleaded without any venue, 7 Darn. and East, 243; and see 1 Wms. Saund. 8; but there are occasions which make it absolutely necessary to state in the declaration that the cause of action really happened abroad, as in the case of specialties where the date must be set forth. But the law has in that case invented a fiction, and has said the party shall first set out the description truly, and then give a venue only for form and for the sake of trial, by a videlicet, in the county of Middlesex or any other county. In declaring on foreign bills, though it is usual to state that they were drawn at the place where they bear date, adding the venue under a videlicet. Bayley, on Bills, 3d Ed. 175; yet this does not seem to be necessary; 3 Campb. 304, 305; but see 2 Barn. and Ald. 301; 6 Barn. and Ald. 16; 2 Dowl. and Ry. 15. S. C.

solid distinction of locality; 1 Stra. 646; 4 T. Rep. 503; *sed quære* if there be no court of judicature to resort to abroad; Id. *ibid.*; 6 East, 599. The formal distinction arises from the mode of trial; for the trials in England being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolute necessary that there should be some county where the action is brought in particularly, that there may be a process to the sheriff of that county to bring a jury from thence to try it; Co. Lit. 125. a. b. This matter of form goes to all cases that arise abroad, but the law makes a distinction between transitory and local actions. If the matter which is the cause of a transitory action arise within the realm it may be laid in the county, the place not being material; as if an imprisonment, be in Middlesex, it may be laid in Surrey, and though proved to be done in Middlesex, it does not at all prevent the plaintiff from recovering damages. The place of transitory actions is never material, except where by particular acts of parliament it is made so; as in the case of churchwardens and constables, and other cases which require the action to be brought in the proper county. The parties, upon sufficient ground, have an opportunity of applying to the Court in time to change the *venue*; but if they go to trial without it that is no objection; so, all actions of a transitory nature that arise abroad may be laid as happening in an English county. But there are occasions which make it absolutely necessary to state in the declaration that the cause of action really happened abroad; as in the case of specialties, where the date must be set forth, if the declaration state a specialty to have been made at Westminster, in Middlesex, and upon producing the deed it bear a date at Bengal, the action is gone, because it is such a variance between the deed and the declaration as makes it appear to be a different instrument; but the law has in this case invented a fiction, and has said that the party shall first set out the description truly, and then give a *venue* only to form, and for the sake of trial by a *videlicet* in the county of Middlesex or any other county.

(d) *Mode of stating.* See also *ante*, tit. Indictment.

1. WARE v. ROYALL. E. T. 1817. K. B. 3 M. & S. 148.

A county is sufficient without a parish.

*Per Cur.* In stating the *venue* the insertion of the county without the parish suffices.

2. EMERY v. FELL. T. T. 1787. K. B. 2 T. R. 28.

And laying *venue* at the beginning of the declaration pervades the whole.

In debt for goods sold and delivered, the plaintiff declared that the defendant at Westminster, in the county of Middlesex, was indebted to him in a certain sum for goods sold and delivered, without alleging an express contract and place where such contract was made. Upon special demurrer,

*Per Cur.* The *venue* cannot be laid in a plainer manner than it is in the present case; the declaration states that the defendant at Westminster, in the county of Middlesex was indebted to the plaintiff. If it were necessary for the plaintiff to prove that the contract was made at Westminster, it may be done under this description, but it is not necessary; for it may be proved any where, which shows that the *venue* is merely added for form's sake; and it is sufficiently laid here.

3. SUTTON v. FENN. M. T. 1772. C. P. 2 Blac. 847; S. C. 3 Wils. 339.

County aforesaid refers to the *venue* in the margin\*

Norfolk to wit, William Fenn, late of Marlborough, Co. Wilt. Yeoman, was attached to answer Robert Sutton of a plea of trespass on the case, &c. And

\* If any other county be stated in the body of the declaration as the place where the facts therein stated took place, that may be considered the *venue*, and the county in the margin be rejected as surplusage; 3 T. R. 387. Or if the place only, and not the county, be stated in the body of the declaration, this may be referred to the county in the margin, Barnes, 481; see Cro. Jac. 167. *contra*; even although the place be stated to be "in the county aforesaid," and another county have been before mentioned, 3 Wils. 340; 2 W. Bl. 847; Cro. Eliz. 437. 465; Cro. Jac. 96. 618; for it is a general rule that the county in the margin may assist the plaintiff, but shall never hurt him; 3 T. R. 387. But stating the county only, as special *venue* in the body of the declaration, or referring to the county in the margin, as, "in the county aforesaid," is sufficient without mention of the parish or place; for since the stat. 7 Ann. c. 16. s. 6. has directed that the *venue* shall be awarded of the body of the county, the parish or place although usually stated is not necessary; 2 M. & S. 148,

thereupon the said Robert, by his attorney, complains that, whereas the said William, 1st January, 1772, at Catton, in the county aforesaid, was indebted to the said Robert in 120l. &c. with several counts in *assumpsit*. To this the defendant demurs generally. It was for the defendant argued, that the declaration was at best uncertain; for that the county aforesaid referred both to Norfolk and Wilts: had it been in the same county, it would have referred to Wilts only; "*Idem proxima antecedenti refertur*;" Co. Litt. 20. b., Jac. 96. 618; Cro. Eliz. (a Warwickshire case;) so that there is no certain venue in this declaration; but by De Gray, C. J. There is no difficulty in this case, the margin governs the whole. All references to counties are supposed to be to the county named in the margin, the other county of Wilts is in the recital of the writ.

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(c) *Changing of.*

1st. *When, or when not, allowed.*

1. *By plaintiff.*

1. STROUD v. TILLY. H. T. 1752. K. B. 2 Stra. 1162.

*Per Cur.* Though a plaintiff cannot regularly move to change the venue, yet he may in effect do it by moving to amend; and it was done so in this case, by striking out "Dorsetshire," and inserting "Middlesex;" see 4 East, 485.

2. EX PARTE NICHOLAS. M. T. 1813. C. P. 6 Taunt. 408.

*Per Cur.* The venue may always be changed, upon stating to the Court a reasonable ground for the application.

2. *By defendant.*

1. HENSHAW v. BURLEY. E. T. 1805. C. P. 1 N. R. 310.

The Court of Common Pleas will not discharge a rule for changing the venue from A. to B.; upon an affidavit showing that the cause of action arose partly in A. and partly in B., and that all the witnesses reside in A. the plaintiff must undertake to give material evidence in A.

Plaintiff may obtain leave to alter the venue; Upon stating to the court a reasonable ground for the application.\*

In the absence of special circumstances the venue will not be changed where the cause of action has arisen in two counties;†

\* And this even after plea pleaded and issue joined, Barnes, 12; but see Id. 19; or even after the venue has been changed on the usual affidavit, 2 Stra. 1202; but not after notice of trial given; 2 New Rep. 58; 7 Taunt. 466. In local actions, upon satisfying the Court that a fair and impartial trial cannot be had in the county where the action is laid, the plaintiff may have leave to enter a suggestion upon the issue to that effect, and have the cause tried in the next adjoining county.

† As in an action for a libel published in two or more counties, 1 T. R. 571; or written in one and published in another county, 2 B. & B. 299, 1 T. R. 647; the Court will not change the venue, 2 Taunt. 5; 6 Taunt. 556; 6 T. R. 363; but where the libel was written and published in one county, 3 T. R. 306; or written here and published in Germany, 3 T. R. 652; but see 4 East, 495; the Court allowed the venue to be changed to the county where the libel was written. In an action for criminal conversation the Court have allowed the venue to be changed. But the venue in actions upon bills of exchange or promissory notes, Barnes, 491; 1 T. R. 571; 1 B. & P. 20; 5 Taunt. 576; or in debt for rent, 2 Stra. 878; or in an action on a specialty, Gilb. C. B. 90; Barnes, 491; 1 B. & P. 425; and see 3 B. & C. 552; 1 Sid. 87; or in an action on an award, 2 B. & P. 355; 3 B. & C. 9; nor in an action on a charter party, or other written instrument not under seal, 7 Taunt. 306; or if the declaration be special upon the written instrument, will not in general be changed; 4 Bing. 39. Yet in covenant where a view was necessary, the Court allowed the venue to be changed to the county in which the premises were situate; 8 East, 268. So, in debt on bond, where a serious defence was intended to be made, and the witnesses on both sides lived at a distance from the place where the venue was laid, the Court upon application changed the venue, 1 B. & P. 20; 1 T. R. 781. There are other cases also in which the Court of King's Bench will not allow the venue to be changed, unless upon very special grounds, as in actions for *scandalum magnatum*, 2 Ld. Raym. 1411; 2 Salk. 668; 2 Str. 807; actions against carriers, 2

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3. *In Exchequer.\**4. *In vacation.†*(f) *Bringing back or retaining of.‡*

Denial of  
the defend-  
ant's affida-  
vit is not  
sufficient to  
retain the  
venue in  
the original  
county;

## 1. FRENCH v. COPPINGER. E. T. 1789. C. P. 1 H. Bl. 216.

A rule having been granted to show cause why the *venue* should not be changed from London to Cornwall, on the usual affidavit stating positively that the action was for money lent in London, it was insisted that this was not

481, 483, 485; 6 Pr. Reg. 424, 425, 426, S. C. and see Cas. Pr. C. P. 159; Pr. Reg. 425; Barnes, 487; S. C. 2 Bos. & Pul. 320, unless he be under terms of taking short notice of trial in London or Middlesex; Barnes, 478, 493; 2 Bos. & Pul. 320; 3 Bos. & Pul. 12. But the motion cannot be made after plea pleaded, Cas. Pr. C. P. 33, 112; Pr. Reg. 423. S. C.; Pallister v. Willan, T. 33. Geo. 3. C. P. 273; 2 Moore, 64; 8 Taunt. 169. S. C.; though if the defendant plead pending a rule nisi for changing the *venue*, this will not prevent the Court from making it absolute, Cas. Pr. C. P. 136; Pr. Reg. 423; S. C.; Barnes, 492; 3 Bos. & Pul. 12; 1 Taunt. 58; and being for a rule to show cause, the motion cannot be regularly made on the last day of term, unless the declaration was delivered so late in the term, that the defendant had not an opportunity of making it sooner: Barnes, 480, 486, 489; Pr. Reg. 426. 427. In the Common Pleas, the rule for changing the *venue* is a rule to show cause, which is drawn up by the secondaries on the usual affidavit, that "the cause of action arose in the county to which it is sought to be changed, and not elsewhere," 2 Marsh, 278, 279; 6 Taunt. 567. S. C.; 1 Chit. Rep. 378; and on inspecting the declaration; 1 Chit. Rep. 57.

\* In the Exchequer, the Court will not change the *venue* in any case where a trial has been had; 1 Price, 146. And in that court the defendant cannot change the *venue*, after having obtained an order for time to plead "on all the usual terms;" it being considered as one of these terms, that the defendant shall not afterwards move to change the *venue*, 3 Price, 3. Therefore, when the order is intended to be without prejudice to a change of *venue*, it should be so expressed in the summons; 3 Price, 3. And the Court will not order the *venue* to be changed, after an order for time to plead, although the defendant proposes to give judgment of the term; 3 Price, 3.

† If the defendant in either court have occasion to change the *venue* in vacation, he may obtain a judge's order for that purpose, on producing a motion paper signed by a counsel or serjeant, with the usual affidavit, and a copy of the declaration.

‡ In the King's Bench, when the rule to change the *venue* is absolute in the first instance, the only way by which the plaintiff can bring it back is by a separate motion; and when the *venue* has been irregularly changed, as where the affidavit is defective, &c., Fleetwood v. Cross, H. 26 Geo. 3. K. B. 3 Durn. & East, 495; the motion is for a rule nisi, which the Court will make absolute on an affidavit of service, unless good cause be shown to the contrary. But when the *venue* has been regularly changed, the motion is a motion of course, requiring only counsel's signature; and the Court will require an undertaking to give material evidence in the county in which the *venue* was originally laid; 2 Salk. 669; 6 Taunt. 567; 2 Marsh, 278. S. C.; 1 Chit. Rep. 378.

It was holden in one case, 7 Durn. & East, 285. that if the *venue* be changed from A. to B; on the usual affidavits, that the cause of action arose wholly in B., when, in fact, a part of it arose in another county, the *venue* might be brought back to A. as a matter of course. But in a subsequent case, 6 East, 433; 2 Smith. R. 447. S. C.; and see 1 Wils. 162; 10 East, 32; it was determined, that though the *venue* be changed by the defendant upon a false affidavit, yet the plaintiff cannot bring it back to the county where it was first laid without the usual undertaking to give material evidence in that county; and of course, if the *venue* be laid in a county where no part of the cause of action arose, it cannot be brought back into that county where the cause of action arose.

sufficient cause, without an undertaking to give material evidence in London. On the other side it was said that as the affidavit of the defendant was falsified, the rule could not be made absolute. But

The Court held that the plaintiff ought to undertake to give material evidence in London, on which defendant undertook to give evidence in London, and the rule was discharged.

2. *DICK v. NORISH*. E. T. 1806. C. P. 3. Taunt. 464.

The plaintiff falsified the defendant's affidavit to change the *venue*, the *venue* was retained, though the plaintiff could not undertake to give material evi-

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Unless under circumstances of mutual inconvenience.

tion arose; *Massey v. Anderton*, H. 43 Geo. 3. K. B. 1 Chit. Rep. 691. a. So, where the *venue* had been changed by the defendant from London to Staffordshire, on the usual affidavit that the cause of action arose in the latter county, and not elsewhere, the Court of King's Bench would not bring it back to London, on an affidavit that the cause of action arose partly in Staffordshire and partly in Worcestershire, and that a material witness resided in London, and on the plaintiff's undertaking to give material evidence in one or other of those counties, particularly as no special facts were stated to show that the defendant's affidavit was not correct, 2 Barn. & Ald. 618; 1 Chit. Rep. 377. S. C.; and mere hardship and delay, in being obliged to try at Lancaster, when all the plaintiff's witnesses reside in London, is no ground for bringing back the *venue* to the latter place, unless the defendant was under terms to take short notice of trial in London, and the undertaker not to assign for error the want of an original writ; 1 Chit. Rep. 691.

In the Common Pleas, the rule for changing the *venue* being only a rule *nisi*, the Court on showing cause will either make it absolute or discharge it, according to circumstances; 2 Marsh. 278, 279; 6 Taunt. 567. S. C.; 1 Chit. Rep. 378. And it was determined in one case, 3 Bos. & Pul. 579; and see 3 Taunt. 464; (but it should be observed, that these decisions seem to have been since overruled;) that an application to change the *venue* from A. to B., in an action for goods sold and delivered, upon an affidavit that the cause of action arose at B., and not elsewhere, might be successfully answered by an affidavit that the goods were sold at C., without an undertaking by the plaintiff to give material evidence in A. So, where it appeared that the cause of action principally arose in Ireland, 2 New Rep. C. P. 397; and see 4 East, 495; or partly in a foreign country, 2 Taunt. 197; the Court discharged a rule for changing the *venue*. In general, however, where there has been no irregularity, the Court will not try the matter upon affidavits; but if there be a positive affidavit that the cause of action arose in a different county from that where the *venue* lay, they will require an undertaking from the plaintiff to give material evidence in the latter county, if the whole cause of action is supposed to have arisen there; 1 H. Blac. 216; and see 1 New Rep. C. P. 110. 310; but if it arose in several counties, the Court will retain the *venue* on the plaintiff's undertaking, in the alternative, to give material evidence in some of them, 1 Taunt. 259; 6 Taunt. 565, 566; 2 Marsh. 278. S. C.; 7 Taunt. 178; 2 Marsh. 494. S. C.; but differently reported, 2 Moore, 64; 8 Taunt. 169. S. C.; and see 1 Chit. Rep. 377. a. And when the whole cause of action arises abroad, the Court will discharge the rule for changing the *venue*, without any undertaking by the plaintiff to give material evidence in this county; 6 Taunt. 569; 2 Marsh. 280. S. C.; and see 1 H. Bl. 280; 1 Taunt. 259, 260; 4 East, 495; 2 New Rep. C. P. 397; 2 Taunt. 197. In the Exchequer, as in the Common Pleas, the rule to change the *venue* is a rule to show cause; 5 Price, 359, 612. And it is the practice in the former court, as in the King's Bench, not to discharge the rule for changing the *venue* without an undertaking to give material evidence in the county in which it was originally laid, 6 Price, 336; but see 5 Price, 359. *semb. contra*, it not being sufficient, as in the Common Pleas, when the cause of action is supposed to have arisen in several counties, to undertake to give material evidence in some of them; 6 Price, 336; but see 5 Price, 359. *semb. contra*.

The appli-  
cation to  
change  
venue  
may be re-  
sisted\* by  
an under-  
taking to  
give materi-  
al evidence  
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in the coun-  
ty where  
laid.

dence in London, where he had laid it, either *venue* being inconvenient to one or other of the parties.

3. *FRENCH v. COPPINGER*. E. T. 1789. C. P. 1 H. Bl. 216.

The plaintiff's affidavit that the cause of action arose where the *venue* is laid, was made in answer to a rule to show cause against changing the *venue*. But it was held insufficient, since he must also undertake to give material evidence in that place.

**Verdict.**† See also particular titles, according to the form of action, or subject matter.

# I. RELATIVE TO CIVIL PROCEEDINGS.

(A) OF GENERAL VERDICTS, p. 335.

(B) OF SPECIAL VERDICTS, p. 336.

(C) ——— CASES ON. See *ante*, tit. Case, Special.

(D) MODE OF DELIVERY. See *ante*, tit. Trial.

\* But it is not sufficient, in order to discharge a rule to change the *venue*, to show that a fact necessary to be proved at the trial, but which constitutes no part of the cause of action, took place in another county or abroad; and, therefore, in an action by the assignees of a bankrupt for money received to the bankrupt's use, it was holden to be no answer to an application to change the *venue* that some of the facts necessary to support the commission arose in the county in which the *venue* was already laid; for, although the bankruptcy must have been proved, it was no part of the cause of action; 1 New Rep. 310. So, to such an application, in an action for criminal conversation, it would be no answer to say that the marriage took place abroad; for, although the marriage must be proved, it forms no part of the cause of action; 1 East, 32. If the plaintiff fail in doing that which he has undertaken, namely, to give material evidence at the trial of some matter in issue arising in the county where the *venue* is laid, he shall be nonsuited; 2 W. Bl. 1031; 2 T. R. 281. But it will be sufficient if, for instance, it be proved that the deed upon which the action is founded was enrolled within the county, Peake, Ev. 213; 8 Taunt. 169; or, it seems, to prove that the cause of action arose abroad, 1 H. Bl. 280; 6 Taunt. 566. 569; 2 Taunt. 197; or to prove that letters containing the promise on which the action was founded were put into the post-office in the county, 8 Taunt. 169; or to prove any other fact material to the cause, although it do not go to the whole cause of action; 6 Taunt. 564. In the Court of King's Bench, in an action in Middlesex, it was holden sufficient to prove a payment of money into court, even although the money were paid in after the rule to retain the *venue* was obtained; 2 T. R. 275. But the undertaking in this case must be understood to have reference only to the evidence necessary to support the declaration; and, therefore, if the defendant confess and avoid the whole cause of action, or plead a tender to the whole declaration, 1 Taunt. 518; or by any other act or omission he render the material evidence the plaintiff could have given unnecessary, 3 Taunt. 86. the plaintiff will not be bound to produce at the trial the material evidence he undertook to give. It was formerly holden in the King's Bench, that the plaintiff must move to discharge the rule for changing the *venue* before replication, 2 Str. 858; and therefore that he came too late after issue was joined, and delivered to the defendant's agent; — v. Boddington and others, M. 20 Geo. 3. K. B. But now, as the plaintiff may alter his *venue*, by moving to amend; so, for avoiding circuitry, he may move to discharge the rule for changing the *venue*, on undertaking to give material evidence in the county where it is laid at any time before the cause is tried; and it was accordingly discharged in one case after the cause had been twice taken down for trial; Cowp. 409.

† If no plea *puis d'arien* continuance be put in and received, and if there be no demurrer to evidence, or nonsuit; the jury, after the evidence is given and the judge has summed it up, proceed to consider of their verdict: the verdict is either general or special.

(E) OF SETTING ASIDE. See *ante*, tit. Trial, div. New Trial.

(F) OF AMENDING. See *ante*, tit. Amendment.

(G) CONCLUSIVENESS OF, AND WHO BOUND BY. See *ante*, tit. Judgment.

## II. RELATIVE TO CRIMINAL PROCEEDINGS. See *ante*, vol.

10. p. 519 tit. Indictment.

### I. RELATIVE TO CIVIL PROCEEDINGS

#### (A) OF GENERAL VERDICTS.\*

1. MILLER V. TRETS. M. T. 1696. K. B. 1 Ld. Raym. 324.

Information was exhibited against the defendant by the plaintiff in the Court of Exchequer for selling lace and silks, &c. Upon issue joined, the jury found the defendant guilty as to selling the lace, &c., but said nothing as to the silks, and judgment was given in the Exchequer for the informer. Upon error brought, this omission in the verdict was assigned for error, upon which a motion was made in the Exchequer for leave to amend, but denied, because it was not amendable; and therefore the judgment was reversed here. The verdict must comprehend the whole of the matter submitted to the jury. [ 336 ]

2. ——— v. Cox. E. T. 1692. K. B. 3 Salk. 372.

Error of a judgment in C. B., in an action of trespass, wherein the plaintiff brought an action against the defendant for several trespasses: for breaking and entering his close, treading down his grass, and taking and carrying away water. The defendant justified as to all, upon which they were at issue, and the jury found him not guilty as to the treading, but gave no verdict as to the other matters. This was adjudged nought, and for this cause the judgment was reversed. Therefore where they found not guilty as to part, and gave no verdict as to the rest, the judgment was reversed.

3. HADLEY V. STYLES. M. T. 1710. K. B. 2 Salk. 664.

Debt on a bill penal for 300*l*. The defendant pleaded *nil debet* for 200*l*, and *debet* as to 100*l*. Counsel urged, that this plea, issue, and verdict were immaterial, and that the debt could not be apportioned. But where the jury in debt on bond and *nil debet* pleaded, found *nil debet* to part and *debet* to the rest, it was deemed sufficient.

*Per Cur.* The plea was ill, but the verdict has made it good. We will intend 200*l*. paid, and an acquittance under seal produced in proof thereof, and the jury may as well apportion here as in debt on a simple contract, where they may find *nil debet* for part; 1 Rol. Rep. 257.

#### (B) OF SPECIAL VERDICTS.†

1. REX V. HUGGINS. M. T. 1729. K. B. 2 Ld. Raym. 1581.

*Per Holt, C. J.* A special verdict, stating the circumstances, as evidence, and not as facts proved, cannot be sustained. The special verdict must state the facts as proved and not merely as evidence.

\* The jury may undoubtedly in all cases give a general verdict, thus taking upon themselves to judge both of the law and the fact, and it is either wholly or in part for the plaintiff or for the defendant. Where the declaration contained thirty counts on fifteen bills of exchange, the judge at Nisi Prius refused to compel the plaintiff to select fifteen of the counts on which to take his verdict. But, on a general verdict, the Court of Common Pleas will compel a plaintiff to elect in the term after the trial on what count he will enter it up. Where an avowant stated that the plaintiff held the premises at a certain yearly rent, and the plaintiff pleaded first, non tenuit, and secondly, replevin arrears, and the first plea was found for the plaintiff; the Court held that the second plea thereby became immaterial, and that the proper course was to discharge the jury from finding any verdict upon it; but that if any verdict was found, it must be entered for the plaintiff; 2 Barn. and Ald. 546. On a verdict for the plaintiff or for the defendant in replevin, the jury shall regularly assess the damages. But when the plaintiff is non-suited on the trial of an issue, he cannot have contingent damages assessed for him on a demurrer, 1 Stra. 507; though when the plaintiff in replevin is nonsuited, the jury may assess damages for the defendant.

† On a general verdict, if false, the jury were liable to be attainted. To relieve them from this difficulty it was enacted by the statute of Westm. 2. c. 13; 6 Edward 1. c. 30. s. 2. that the justices of assize shall not compel the jurors to say precisely whether it be disseisin or not, so as they state the truth of the fact, and pray the aid of the justices; but if they will say of their own accord that it is a disseisin, their verdict shall be admitted at their own peril. Upon this statute it has become the practice for the jury, when they have any doubt as to the matter of law, to find a special verdict stating the facts and the law arising thereon to the decision of the Court, by concluding conditionally that, if upon the matter alledged, the Court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. In finding special verdicts, when the points are single and not complicated, and no special

[ 337 ]  
And it is a  
settled rule  
that the  
Court will  
not intend

2. WILLIAM V. SEARS. H. T. 1743. K. B. 1 Wils. 55.  
*Per Cur.* Where the verdict finds the recovery only, and not a word of any writ of seisin, there is nothing more settled than that the Court can intend nothing in a special verdict but what is found by the jury; Hob. 262.

any thing in a special verdict but what is found by the jury.\*

3. BURY V. PHILIPS. E. T. 1788. K. B. 2 T. R. 354.

*Per Lord Kenyon, C. J.* Though much certainty is essential in a special verdict, still it does not require the same as in pleadings.

However, a  
less degree  
of certain  
ty is requir  
ed than in  
pleadings.

### Visitor.†

- I. APPOINTMENT OF, p. 337.
- II. JURISDICTION OF, p. 338.
- III. JUDGMENT OF, p. 339.
- IV. MANDAMUS CONNECTED WITH, p. 340.
- V. OF THE SUCCESSOR, p. 340.
- VI. OF A VISITATION, p. 340.

### I. APPOINTMENT OF.

1. BURY V. PHILIPS. E. T. 1788. K. B. 2 T. R. 352.

The nomin  
ation of a  
visitor is by  
the patron  
or founder  
of a corpo  
ration;‡

*Per Holt, C. J.* Visitations are necessary consequents one upon another; for this visitatorial power was not introduced by any canons or constitutions ecclesiastical. It is an appointment of law. It arises from the property which the founder had in the lands assigned to support the charity; and as he is the author of the charity, the law gives him, and his heirs, a visitatorial power; that is, an authority to inspect the actions, and regulate the behaviour, of the members that partake of the charity.

conclusion, the counsel, if required, are to subscribe the points in question, and agree to amend omissions or mistakes on the meane conveyance, according to the truth to bring the point in question to judgment; and unnecessary finding of deeds in *hæc verba*, where the question rests not upon them, but which are only derivation of titles, ought to be spared, and stated shortly according to the substance they bear in reference to the deed, as feoffment, lease, grant, &c. &c. If there be a special verdict the plaintiff's attorney generally gets it drawn from the minutes taken at the trial and settled by his counsel or sergeant who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel or sergeant to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of Nisi Prius in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record, after which a concilium is moved for a rule drawn up thereon with the clerk of the rules in K. B., or secondaries in C. P. the cause entered with the clerk of the papers or secondaries copies of the record made and delivered to the judges and counsel instructed and heard in like manner as upon arguing a demurrer. In the K. B. a special verdict must be set down in the paper for argument within four days, and cannot be set down afterwards without leave of the Court, and in the C. P. the clerk of the docket makes six copies of the special verdict; viz. four for the judges and two for the sergeants on each side. After the Court have given their opinion, a rule is drawn up for the delivery of the postea to the prevailing party, upon which he is immediately entitled to tax his costs and take out execution without rule for judgment; but the other party may have a rule which shall be duly served to be present at taxing costs.

\* The law which is favourable to verdicts will suppose that the jury doubted of nothing but what but what related to the matter in question before them. So, on a special verdict, with a general conclusion, the Court will doubt of no more than the jury doubted of. And, if a special verdict on a mixed question of fact and law find facts from which the Court can draw clear conclusions, it is no objection to the verdict that the jury have not themselves drawn such conclusions and stated them as facts in the case.

† Corporations for public government are not subject to visitors; S. C. 1 Ld. Raym. 8. Corporations for private charity are subject to the founder and visitor.

‡ In fact, whoever founds a charity, whether he be the sovereign or a subject, has the right to nominate visitors of the same; and, in case no such persons be appointed, he and his heirs will have by implication the superintendence thereof. If, in the case of a subject having been the founder, there is not any one who can act as visitor in consequence of incapacity of the person, or a failure of heirs, the duties of that office devolve upon the king, which it then becomes the task of this Court to execute for his Majesty in the same manner as if it had been a mere royal foundation. If a visitor be appointed by the founder of a college, and charities are given to that college afterwards, they are not subject to the control of that visitor; Rex v. Jennings, 5 Mod. 420.



## 2. CASE OF RAVENSWORTH HOSPITAL. E. T. 1808. K. B. 8 East, 221. [ 338 ]

The founder of an hospital directed that if, in making up the accounts of the wardens triennially going out of office, any doubt should arise which could not be decided by the new wardens, the ordinary should decide it, and also gave to him the appointment of a master upon the default of other persons to appoint within certain times, and power to correct and remove the master for certain causes, also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes until the money was replaced, and also gave to the ordinary the power of interpreting the statutes in case of any doubt; and the founder also delegated to the dean and chapter of York power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity. And cannot be implied.

The Court held, that none of the powers so delegated constituted a visitor so as to exclude the application of the powers granted by stat. 43 Eliz., and consequently that a commission of charitable uses issued out of the Court of Chancery under the act was valid.

## II. JURISDICTION OF.

1. *REX V. BISHOP OF WORCESTER.* M. T. 1814. K. B. 4 M. & S. 415.

*Per Cur.* If the power of the visitor is to be under restriction or limitation, it must be so expressed.

*REX V. BISHOP OF ELY.* E. T. 1788. K. B. 2 T. R. 290.

*Per Cur.* Where, by the statutes of a college, the right of appointment to the mastership devolves on a person named, who is also a general visitor, on neglect of the fellows to elect such nominee, he has not that right as a visitor, but by the special appointment of the founder. Then, if it be not a visitatorial act, the propriety of the thing done and the visitor's conduct cannot be inquired into by himself as visitor, because that would be to determine on his own right, for he claims an interest, and asserts a right; and a visitor cannot be a judge in his own cause, unless that power be expressly given to him; and in all these cases the power of deciding the question and construing the statutes devolves on the courts of law. If the power be limited, it must be so expressed.\* At all events he cannot act in his own cause. [ 339 ]

## III. JUDGMENT OF.

*Rex v. Bishop of Ely.* H. T. 1788. K. B. 2 T. R. 290.

*Per Holt, C. J.* From an act done by a visitor as ordinary, an appeal lies to his superior; but if as patron, no appeal lies. Judgment given as patron is final.†

\* In some instances, the power of the visitor is regulated by statutes or ordinances imposed by the founder; in others, he is without controul. In those of the former kind, if he should not abide by the rules laid down, his acts, except under certain circumstances where the king is visitor, are without authority, and null in those of the latter, he having no guide but his own discretion, which no person has any right to interfere: his power is arbitrary. A visitor has power, to nominate, to hear appeals; 4 Mod. 109; 1 Ld. Raym. 8. S. C. A visitor may deprive without the concurrence of another person; 4 Mod. 110; 1 Ld. Raym. 58; Holt, 715; Skin. 407. If a visitor has no authority by the founder to determine offences, yet it is incident to his office; *Rex v. St. John's Cambridge*, 4 Mod. 238. Royal foundations are not visitable by bishops; *Dean of Dublin v. Archbishop of Dublin*,

† The visitatorial power is an appointment, and is not of ecclesiastical origin. Where the interest of a charity is vested by the donor in trustees, there the law does not raise a visitor; but where they who are to have the benefit of the charity are incorporated, there the law raises a visitatorial power in the founder and his heirs, unless the founder has appointed some other person; *Bury v. Phillips*, 2 T. R. 354. \* No appeal lies from his sentence, for he is *fidei commissarius*, especially in the case of a fellow of a college, which is a thing of a private design, and does not concern the public; *Mr. Parkinson's case*, 3 Mod. 365. His determinations are not examinable in another court; 1 Ld. Raym. 8 Skin. 13. 498. 513. But from the sentence of one who is visitor as ordinary only there lies an appeal, though not from the sentence of a visitor as patron; S. C. Skin. 435. If the fellow of a college be deprived according to the statutes of the founder, the appeal must be to the visitor, and then to the delegates; 1 Mod. 85. The Court will not grant a *mandamus* to restore the fellow of a college who has been deprived by the visitor appointed by the founder; *Appleford's case*, 1 Mod. 82, 83. When a visitation is made by the archbishop all acts of the bishop are suspended by an inhibition; 3 Sulk. 201.

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## IV. MANDAMUS CONNECTED WITH.

REX v. BISHOP OF LINCOLN. E. T. 1788. K. B. 2 T. R. 338.

A manda-  
mus lies to  
compel a  
visitor to do  
his duty.

*Per Cur.* Is this a case in which a mandamus ought to be granted? It is objected, that a mandamus ought not to go to a visitor. We have often considered the serious consequences which would follow from granting a mandamus to a visitor. This Court will not interfere in such cases; but those are only cases where he is clearly acting under a visitatorial authority. But here the Bishop of Ely was not acting as a visitor; he could not act in that character; neither did he himself conceive that he was acting as visitor. His acts show that he was not, and he acted without giving notice to the persons on whom he was judging. Then, if he had no power in this case to act as visitor, nor thought at the time that he was acting as such, our determination will not interfere with any of the older decisions. No bad consequences can be apprehended from our granting this mandamus; and, by granting it, we shall do that which has been the consistent aim of this court in granting a mandamus, namely, to prevent injustice.—Rule absolute.

## V. OF THE SUCCESSOR.

REX v. ST. CATHARINE HALL. E. T. 1791. K. B. 4 T. R. 233.

Where the  
corporation  
is eleemo-  
synary and  
no successor  
nominated,  
it devolves  
to the king  
in Chance-  
ry.\*

In the case of a private eleemosynary lay foundation, no special visitor was appointed by the founder. The Court held the right of visitation, in default of the founder's heirs, devolves upon the king, to be exercised by the great seal. On this ground the king is the visitor for St. Catharine's Hall, Cambridge, and this Court refused to interfere by mandamus to compel the master and fellows to declare one of the fellowships vacant, and to proceed to a new election.

## VI. OF A VISITATION.

BURY v. PHILIPS. E. T. 1788. K. B. 2 T. R. 348.

Administer-  
ing an oath,  
and hearing  
and address-  
ing com-  
plaints, is a  
visitation.

The bishop appointed a visitation to be held in the chapel on the 16th of June, and the rector and fellows refused to open the doors on the day appointed, but protested in the area, and the visitor called over all their names, and swore a person to prove the summons, and went away without doing any more, and afterwards he appointed another visitation in the hall, on the 24th of July following, and called over all their names, and registered the act of the 16th of June, notwithstanding a protest against all the proceedings. This visitation is good, and what passed on the 16th of June was no visitation.

## Voluntary Conveyance.

## I. RELATIVE TO, AS AGAINST PURCHASERS, p. 341.

## II. CREDITORS, p. 343.

Fort. 329. The bishops can visit but once in three years; Phillips v. Bury, Skin. 478. Though a visitor be by the constitutions of the college restrained from visiting ex officio above once in five years, yet he has a constant standing authority to hear complaints and redress grievances; Skin. 478. The visitor in his citation must pursue his authority; Bentley v. Bishop of Ely, 2 Stra. 913. Where the visitor is disturbed and hindered, that cannot be called a visitation; Phillips v. Bury, Holt, 720, 721. The power of a visitor cannot be controlled, because it is absolute; S. C. Holt, 722. Corporation acts are examinable by the visitor; Fort. 299; Bentley v. Bishop of Ely, 2 Stra. 793. The chancellor is visitor of all the king's free chapels, and all the colleges of the king's foundation; 1 Mod. 85. The visitor shall determine all that relates to persons who are of the foundation; Rex and Reg. v. St. John's College, Oxon, Holt, 437; Com 238. Where the crown has appointed a general visitor it cannot afterwards enlarge his powers; Bentley v. Bishop of Ely, Fort. 300. Contumacy is a good cause of deprivation; Phillips v. Bury, Skin. 489, 490. The visitor may punish one man for an act by him done jointly with others; Bentley v. Bishop of Ely, Stra. 913. Where a visitor has authority to deprive, and does so in pursuance of that power, the justice, or sufficiency of his sentence as to the cause of it, is not examinable in the common law courts; per Holt; C. J., Phillips v. Bury, Skin. 482, 500.

\* The appointment of a bishop without his christian name to be visitor extends to his successors; Bentley v. Bishop of Ely, 2 Stra. 913. The heirs of the founders are visitors of eleemosynary corporations in default of appointment; Phillips v. Bury, 1 Ld. Raym. 8 Skin. 483; Holt, 724. But not in ecclesiastical corporations; Skin. 485.

## I. RELATIVE TO, AS AGAINST PURCHASERS.

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1. CHAPMAN, D. STAVERTON, v. EMERY. E. T. 1775. K. B. Cowp. 278.

One after marriage made a settlement of certain premises upon himself for A voluntary conveyance<sup>1</sup> is void against a subse-  
 life; remainder to his wife for life; remainder to their issue in tail; and three years afterwards mortgages the premises to B., who was told there was such a settlement. For the defendant it was insisted; 1st. That the stat. 27 Eliz. c. 4, related only to purchasers, and that a mortgagee was not a purchaser  
 quent pur-  
 chaser with

<sup>1</sup> There are many cases also in which one possessed of property may previously to his making of sale of the same with a fraudulent intent enter into an agreement with another for the purpose of reaping pecuniary or other advantage from the transaction to the injury of the purchaser. The frequency of attempts at this species of manifest injustice was greatly checked by the well-known statute, the 27 Eliz. c. 4. rendered perpetual by the 33 Eliz. c. 18. s. 31. by the second section whereof it was enacted, that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use or uses, if in or out of any lands, tenements, or other hereditaments whatsoever, had or made for the intent and of purpose to defraud and deceive such person or persons, bodies politic or corporate, as had or should purchase in fee simple, fee tail for life, lives, or years, the same lands, tenements, or hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, encumbered, or limited in use, to defraud and deceive such as should or had purchased any rent, profit, or commodity, in or out of the same, or any part thereof, should be deemed and taken only as against that person and persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person and persons lawfully having, or claiming by, from, or under them, or any of them which had purchased, or should thereafter so purchase for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit, or commodity, in or out of the same, to be utterly void, frustrate, and of none effect. It may be remarked that, as the legislature has rendered the transaction void, the circumstance of the purchaser having previous notice thereof does not in anywise affect his right: 5 Co. 60. The *prima facie* ground upon which this court exerts a concurrent jurisdiction in relation to this statute is, it is conceived, its superior means of ascertaining the intent by it; the statute itself must receive the same construction, and have the same operation in a court of equity as in a court of law. There is, however, a more specific reason for this Court's interference, which arises from its peculiar construction of contracts; 18 Ves. 118.

By the 4th section of the statute it is provided, that the same shall not extend to be construed to impeach, defeat, make void, or frustrate any conveyance, assignment of lease, assurance, grant, charge, lease, or estate, interest or limitation of use or uses, of, in, to, or out of any lands tenements, or hereditaments, had, or made, upon or for good consideration, or bona fide to any person or persons, bodies politic or corporate; from this clause as contrasted with the former, the natural inference would be, that any such transfers as are not upon good consideration, and not *bona fide*, being virtually exempted, fall not within the definition of acts done with an intent to defraud or deceive; but courts of law and of equity have shown a disposition to declare that the transaction need not be effected with both conditions, but that if it be merely *mala fide*, or merely voluntary, it may be brought within the meaning and operation of the statute; 1 N. R. 332. And this construction has been made where the purchaser had notice of the fraudulent or voluntary act; 2 Bro. C. C. 148. But, although such appears to be the doctrine, Sir William Grant had great difficulty to persuade himself that the words of the statute warranted, or that the purpose of it required such a construction; for he said it was not easy to conceive how a purchaser could be defrauded by a settlement of which he had notice before he made his purchase; on the other hand, however, it has been declared that such knowledge was not of a title, but of a fraud and nullity; 18 Ves. 111. This Court, considering an agreement for a purchase to constitute an equitable right declares that, if it be a *bona fide*, and upon a valuable consideration, it will not be effected by a fraudulent or voluntary settlement any more than the purchase of a legal estate; and has, accordingly, under such circumstances, decreed in favour of one who had so contracted against others, to whom the legal estate had been conveyed; 18 Ves. 100. In the fifth section of the same important statute, one species of fraudulent assurance is particularly defined. It is thereby enacted, that if any person or persons make any conveyance, gift, grant, demise, charge, limitation of use or uses, or assurance of, in, or out of any lands, tenements, hereditaments, with any clause, provisional article, or condition of revocation, determination, or alteration, at his or their will or pleasure, of the same, of, in, or out of the same lands, tenements, or hereditaments, or any part or parcel of them contained or mentioned in any writing, deed, or indenture of such assurance, conveyance, grant, or gift, and afterwards bargain, sell, demise, grant, convey, or charge the same lands, tenements, or hereditaments, or any part or parcel thereof, to any person or persons, bodies politic and corporate, for money or other good consideration, paid or given, that then the said former conveyance, assurance, gift, grant, and demise, as touching the said lands, tenements, and hereditaments, so after bargained, sold, conveyed,

[ 342 ] within 27 Eliz. c. 4. The purchasers there specified are purchasers in fee simple, fee tail for life or years, and must be either absolute or conditional purchasers; but a mortgagee can hold the estate only till the debt is paid; therefore, not a purchaser within the meaning of the statute. But, supposing he was, yet here the wife did not join, nor was any fine levied. The mortgagee in this case had full and sufficient notice, and no pretence or circumstance of fraud appears; on the contrary the settlement was three years prior to the mortgage, therefore could not have been made with a view to defeat it. *Townsend v. Windham*, 2 Ves. 10, was cited, where Lord Hardwicke said, "If there is a voluntary conveyance of a real estate or chattel interest by one not indebted at the time, if such voluntary conveyance be for a child, and no particular evidence or badge of fraud to deceive subsequent creditors, it will be good, though the party afterwards became indebted."

Lord Mansfield. I rather doubt Lord Hardwicke's saying that, where a woman about to marry a second husband makes a settlement of her estate upon the children by her first husband, such settlement has been held good. As to the point of notice, it is held that notice makes no difference, because it is of a conveyance made void by the statute.

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Though there was an intermediate fraudulent conveyance.

A conveyance on a marriage is deemed a bona fide purchase.\*

But a vendee at an inadequate price is not a bona fide purchaser.

2. *DOE, D. BOSHELL, v. MARTYR*. E. T. 1802. C. P. 1 N. R. 332.

*Per Cur.* The title of a purchaser for a valuable consideration cannot be defeated by a prior settlement of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud he, the purchaser, was ignorant.

3. *DOE, D. WATSON, v. ROUTLEDGE*. M. T. 1777. K. B. Cowp. 705.

*Per Cur.* A purchaser, to entitle himself to the protection of the stat. against such fraudulent settlement, and to set it aside, must be a purchaser *bona fide*, or for good consideration at marriage, but the consideration need not be in money. To make a voluntary settlement void against a subsequent purchaser, within the stat. 27 Eliz. c. 4, it must be covenous and fraudulent, not voluntary only.

4. *DOE, D. PARRY, v. JAMES*. H. T. 1814. 16 East, 212.

In this case it was held that, though a purchaser for a valuable consideration may recover in ejectment against one who claims only under a voluntary settlement, of which such purchaser had notice; yet it seems that the inadequacy of consideration for such purpose is material, if it extend so far as to show that it was not made *bona fide*, but merely colourably to get rid of the first settlement, and make another, which was also in truth a voluntary settlement.

## II. RELATIVE TO, AS AGAINST CREDITORS. See also *ante*, tit. Composition with Creditors; and tit. Bankruptcy.

In general a voluntary conveyance

1. *HOLBIRD v. ANDERSON*. E. T. 1793. K. B. 5 T. R. 235.

A. indented to B. and C., after being sued to judgment and execution by B. and C., and voluntarily gave him a warrant of attorney to confess judgment, or charged against the said bargainees, vendees, lessees, grantees, and every of them, their heirs, successors, executors, administrators, and assigns, and persons claiming by, from, and under them, should be deemed, taken, and adjudged to be void, frustrate, and of no effect; but by the following section it is declared that no lawful mortgage made *bona fide*, without fraud or covin, upon good consideration, should be impeached or impaired by force of the act. It has, however, been decided, that a reservation in a voluntary settlement of a power to mortgage is, in effect, a power of revocation; 2 Vern. 118. In conclusion, it must be observed, that a conveyance which is void as against a subsequent purchaser may, nevertheless, be binding upon the party or his representatives; 1 Vern. 272.

\* So a lessee at rack rent; *Goodright, d. Humphreys, v. Moses*, 5 Black. 1019. A grant in consideration of releasing an assertion of title is *prima facie* for value; *Hill v. Bishop of Exeter*, 2 Taunt. 69.

† By the stat. 13 Eliz. c. 5. made perpetual by 29 Eliz. c. 5. s. 1. somewhat analogous to that already mentioned in respect of purchaser, it was enacted by second section thereof, that any and every feoffment, gift, grant and alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or any of them, or of any lease, rent or common, or other profit of charge, out of the same or any of them by writing, or otherwise, all and every bond, suit, judgment and execution, had or made for the intent or purpose to delay, hinder, or defraud creditors and others, should be deemed and taken only as against the person or persons who might be thereby disturbed, hindered, de

ment, on which judgment is immediately entered, and execution levied the same day on which B. would have been entitled to execution, and had threatened to sue it out, the preference so given by A. to C. was holden not unlawful nor fraudulent, without the meaning of the stat. 13 Eliz. c. 5. [ 344 ]

laid or defrauded, to be void, frustrate, and of non effect. But by section 6 thereof it is provided that this enactment should not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods, or chattels, upon good consideration, and *bona fide* lawfully conveyed or insured to any person or persons, or bodies politic or corporate, not having at the time of such conveyance to them made any manner of notice or knowledge of such covin, fraud, or collusion. It will be observed that the object of this statute is carried to an extent with respect to the description of property comprehended therein beyond what is sought to be obtained by the 27 Eliz. c. 4; for whilst that is confined in its operation to real estates, this comprizes personality likewise. In the present case, as in that of purchasers, it has been held that the operation of the statute may be applicable where the transaction is not evidently *mala fide*. In some instances, voluntary deeds, as such, are void against creditors by virtue of it, but not in all those cases in which they would be so against purchasers under the 27 Eliz. c. 4. for in the former instances the acts do not so necessarily refer to each other as in the latter. Although a voluntary conveyance may generally be made of real or personal property, without any consideration whatever, and cannot be avoided by subsequent creditors, unless it be also of the description mentioned in the statute, that is with an intent ultimately to defraud, the rule is restricted to the case where the settler is indebted at the time. But as most men are at all times indebted to some amount, though it be fluctuating and inconsiderable, a rule that if one be at all indebted at the time of executing a voluntary conveyance, the same should be void without the qualification of its being done with a fraudulent intent, would in almost every instance, invalidate such an instrument against creditors; a question then naturally arises where there are creditors prior and subsequent to the deed, whether the same is ineffectual against the latter as well as the former. In one instance it was declared that this depended upon the fact whether the debtor at the time of its execution was or was not in solvent circumstances; and in others it has been said that, if the settlement be declared void, the property becomes part of the assets, and therefore, liable to the claims of subsequent creditors. But the better opinion seems to be, that in a common case, where the debtor does not seem to have intended a fraud, it is void only against those of his creditors to whom he is proved to have been indebted at the time of its execution. This Court, however will not lend its assistance to compel the discovery of that fact, and it appears to have been decided that a creditor is not in a situation to impeach a fraudulent or voluntary conveyance until he has obtained judgment at law for his debt. But it may be observed that, if a voluntary conveyance were to contain a provision for the payment of the settlement it would not perhaps be considered void against creditors; and it appears that if the property were of such a nature as not to have been at the time within reach of his creditors, as if it were copyhold, or a chose in action, as stock in the public funds, a voluntary assignment thereof would not be void, even against those to whom he was indebted at the time. And in conclusion it must be remarked that, although a conveyance may under the circumstances, be void against creditors, it may nevertheless, be binding upon the party who made it, and his representatives; and that if in such case any portion of the property should remain after satisfaction of the creditors, it would pro tanto be effectual as against him.

\* Thus an assignment or a warrant of attorney to confess a judgment given to a trustee for an equal distribution of the party estate among all his creditors is valid if *bona fide*, though the demand of a particular creditor who is suing him may be thereby defeated except for a proportionable part; 4 East, 1. So, a warrant of attorney to confess judgment given by a debtor to one of his creditors as a security for his debt, and in order to defeat the pending execution of another creditor, was held valid; 5 T. R. Where a debtor was sued by his creditor, and, pending the suit, executed an assignment of his effects to trustees who took possession for the benefit of all his creditors, it was held the assignment was good, though the fact of the assignment was unknown to, and therefore unacquiesced in by, any of the creditors at the time, the act itself being laudable that determined its nature, and the motive was immaterial; 3 M. & S. 371. Where A. by deed assigned all his effects to W. to trustees for the benefit of certain creditors for four years, and the trustees were empowered to sell at the expiration of two years or sooner if A. should direct, and apply the proceeds of the sale in discharge of the debts of such creditors, who covenanted that A. might continue at home or abroad; and that they would not molest him for two years from the date of the deed; it was held that such assignment was valid, and not within the stat. 13 Eliz. c. 5; and that the property was thereby protected against a judgment creditor who had sued out execution against A. after the deed was executed; 5 Moore, 19. But a conveyance in trust for payment of the debts of the party making it for the benefit of some particular creditor without other circumstances, such as the debtor's giving up possession, the creditor's being a party to the conveyance, or his having notice of it, or his entering into an agreement for forbearance, or to release his debt, will under circumstances be considered as invalid; 2 Vern. 518.

ance to a  
bona fide  
creditor is  
valid.\*

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But he  
should have  
possession."

2. EDWARDS V. HARRERS. T. T. 1788. K. B. 2 T. R. 587.

A debtor having made an absolute bill of sale of all his effects in his house under an agreement at the time, but which did not form part of his bill of sale, that the creditor, if the debt was not paid within fourteen days, might enter upon and sell the effects, continued in possession, delivering only a corkscrew to the vendee, till his the vendor's death, which happened before the expiration of fourteen days, the bill of sale was considered as fraudulent against a creditor whose debts were existing at the time. The Court being of opinion that if there is nothing but the absolute conveyance without the possession, that in point of law is fraudulent.

\* For the vendor or donor of goods under an absolute bill of sale or assignment of property continuing in possession is generally considered as a badge of fraud; for, if a man sell or assign goods absolutely and still continue in possession as visible owner of them, such disposition necessarily carries with it an impression that all is not fair. The decisions on this point bear a great resemblance, and are in some degree governed by those under the 21 Jac. 1, c. 19, against assignments by bankrupts in fraud of their creditor. In cases of this nature the notoriety of the change of property is the question on which the validity or invalidity of the transaction depends; 1 Gow. 34. Therefore, if a general assignment be made of household furniture, and the assignor continue in possession, it is not protected against an execution at the suit of one of his creditors, unless the assignment was notorious; 1 Gow. 33. Where one, being indebted to two persons pending an action against him by one of them, made a general deed of gift of all his goods, &c. to the other in satisfaction of his debt, and notwithstanding that he continued in possession of the goods, that circumstance was considered as a sign of fraud, and the gift was held to be fraudulent within the statute; 3 Co. 81.

So, an assignment of furniture, &c. by a debtor to some of his creditors in satisfaction of their debts, retaining possession under a demise at rent, and afterwards taking a re-assignment from some on payment of their debts with interest, would be void as against other creditors, and a conveyance of chattels, unaccompanied with the possession, is void, although in the same instrument be contained a valid mortgage of leasehold buildings, in which the chattels are situated; 5 Taunt. 212. So, likewise, if a man convey his land absolutely, and yet is allowed to continue in possession as its absolute unqualified owner, this will be proof that the conveyance was fraudulent. Thus, if a man mortgage his land, and yet continues in possession, no disseisin is thereby created. If it was an absolute conveyance, and a continuance in possession afterwards, this shall be adjudged in law to be fraudulent; 2 Buls. 226.

So, where a man conveys his lands to pay his debts, and yet retains the conveyance in his possession, this will *prima facie* be considered to be a mark of fraud, as it leaves him an option to set up the conveyance or not, as it suits his purpose; 2 Vern. 510. So, if a creditor under an execution suffers the goods or property to remain in the hands of the debtor, or does not levy for a long time, or quits the property without leaving any party in possession, this will not bar another creditor's right to the goods; 1 Ves. 245.

There are, however, cases where, although the vendor or assignor of property has continued in possession, the bill of sale or assignment has not been held fraudulent; as, where the want of immediate possession be consistent with the deed or contract, and the change of the property be *bona fide* and notorious; 2 Ves. 245, 456; as where a husband before marriage conveyed to trustees all his household goods, particularized by a schedule annexed to the settlement, to the use of himself for life, to his wife for life, remainder to the first and other sons of the marriage. In strict settlement, the possession of the husband was held not fraudulent against a creditor whose debt existed at the time of the settlement, because it was in pursuance and in execution of the trust; Cowp. 433. Upon the same principle if a wife on her marriage assigns all her personal property, consisting, amongst other things, of cows, and the

increase and produce thereof, to trustees upon trust to permit her to enjoy the same without her husband intermeddling therewith, this property is not afterwards liable to be taken in execution for the husband's debts upon the ground of the deed being fraudulent, for the possession is consistent with the deed, and as to the produce, it is the same as if the wife had paid the money over to the trustees, and they had bought other cows, for she acted as their agent, 3 T. R. 320; and it is not necessary, in order to prevent such a settlement from being considered fraudulent, that there should be an annexed schedule of the goods assigned by it, 3 T. R. 618; for, as such a schedule would be known only to the parties interested in the settlement, it conveys no information to the rest of the world, and therefore is immaterial. It seems likewise that an assignment of goods by the husband in trust for his wife, though after marriage, would not, if made for a valuable and adequate consideration for moving from the wife, be considered fraudulent against creditors, except in cases of bankruptcy, on the mere ground of the husband's continuing in possession; for, considering the relationship between them, his possession may be said to be consistent with the deed; 10 Ves. 150. If that fact, however, connected with other considerations, be grossly inadequate, or the wife permits third persons to treat the property in question as the husband's, it may afford evidence that the assignment was made in fraud of creditors; 10 Ves. 151.

So, the presumption of fraud attaching upon the continued possession is repelled not only where the modified interest of the vendor under the deed makes it consistent with the deed, but likewise where such possession necessarily arises out of the nature of the transaction between the parties, they have in view an honest purpose; as, where the supercargo of a ship made a bill of sale of the goods which he had on board the ship which was going on the voyage, and of the produce and advantage which should be made thereof, as a security for the repayment of money lent by the vendee, it was held in a suit in equity between the vendee and a creditor of the vendor, by judgment obtained prior to the bill of sale, that the keeping possession of the goods after the sale was not fraudulent, as the trust of those goods appeared upon the very face of the bill of sale, the vendor being trusted by the vendee to negotiate and sell them for his advantage; 2 Atk. 559. So, where a donee lends a donor money to buy goods, and at the same time takes a bill of sale for securing the money, the donor's continuance in possession will not be fraudulent; Bul. N. P. 253. And so, as we have before seen, where a debtor assigned his property to trustees for the benefit of certain creditors, who were not to take possession till the expiration of two years, but then absolutely, the assignment was held good; 5 Moore, 19. But the circumstance of a deed or assignment providing that the assignor may remain in possession will not in all cases repel the presumption of fraud. Thus, if the debtor make an assignment of his goods, with condition that possession shall not be taken till forfeited, the assignment will nevertheless be considered fraudulent, for here the vendor neither conveys a modified interest to vendee, nor is it made for a purpose, which, in some of the preceding cases, entitles him to continue in possession. The introduction of such a condition will no more make the vendor's possession consistent with the deed than a clause inserted in an absolute bill of sale that the vendor shall remain in possession would make such possession consistent with the deed; the cause in each case would raise a suspicion of fraud; Newland, 376. In considering the question in relation to creditors, where the debtor continues in possession of goods mortgaged, it has been said that this was fraudulent at common law, and the 13 Eliz. provides against it that it shall be void. There is no distinction whether the sale be absolute or conditional: courts of equity and juries are to consider upon evidence whether the conveyance was made with a view to defraud or not; 1 Atk. 167.

A *bona fide* transaction will not be affected with the charge of fraud, because an interval elapses between the execution of the deed of assignment and the taking possession under it, unless other rights or interests have intervened. Thus, where goods lying on a wharf were purchased, and an order was given

[ 347 ] for delivery, but no transfer was made until six months afterwards, when possession was taken, and the vendor a few days afterwards became bankrupt, the title of the vendee was preferred; 15 East, 21. It frequently happens that the defendant under an execution is suffered to remain as the apparent owner of the goods; such circumstances, as before observed, will in general amount to a presumption of fraud, which, however, may be repelled. Thus, where a creditor took the goods of a defendant in execution upon a judgment confessed on a warrant of attorney, and bought them by public auction, and took a bill of sale from the sheriff for a valuable consideration, after which he let the goods to the former owner for a rent which was actually paid, it was held that the creditor had a title which could not be impeached as fraudulently paying other creditors having executions against the same defendant; 4 Taunt. 823. Where the goods of A. were taken in execution, and purchased at a public auction by B., who suffered A. to continue in possession, in order that he might carry on his business, and A. afterwards executed a bill of sale to C., it was held that B. was entitled to them as against C. But where the goods of a trader were taken in execution by the creditor, who afterwards suffered the debtor to remain in possession, and he became a bankrupt, it was held that he was the reputed owner under the statute of James, and the assignees were entitled to the property; 1 B. & P. 82. Where B. lent A. money to buy the goods, and took assignment of them as a security for his debt, though A. remained in possession, it was held not to be fraudulent; but if the assignment had been made to any other creditor, the retaining possession would have made the assignment fraudulent as to other creditors; 1 Ld. Raym. 280. Where the property and goods of A., being in possession of the sheriff under a writ of *fieri facias*, he executed a deed of assignment to B. for a valuable consideration, on which the execution was withdrawn, B. superintended the management of the property, but allowed A. to continue in possession, and the same property was seized under a subsequent execution at the suit of C.; it was held that such property was protected by the assignment to B. though A. had continued in the visible possession; 1 Moore, 189. Where the chattel is not capable of an actual delivery to the true owner, the delivery of a muniment, or other article, if *bona fide*, is a sufficient delivery to prevent the sale or assignment being void within this statute, as in the case of an assignment of goods at sea, with the delivery of the bills of lading and policies of insurance, and other documents, 1 Atk. 159; and in the case of a mortgage of a ship at sea, the delivery of the grand bill of sale is sufficient. Under a *bona fide* sale of goods, the delivery of the key of the warehouse in which the goods are contained is sufficient; 7 T. R. 67. Where a canal company had advanced money to their engineer, with which he procured the goods in question, which were materials of bulk, and deposited them on the banks of their canal, for the purpose of being used, and afterwards executed a bill of sale of them to the company, delivering a halfpenny in the name of the possession of the materials, it was held that this deed was not fraudulent against his creditors, for no other possession could have been given; before the bill of sale was executed the goods were apparently in the possession of the company, because they were lying on their banks; the vendor had no possession of the goods, otherwise than because he had the property in them, but then he transferred that property to the company who had the property, and in whom the possession was before.

A bill of sale, also unaccompanied by possession, is valid against a creditor who is privy and assenting thereto, and though no possession be given, a presumption that the sale is *bona fide* may arise from the fluctuating state of the market; as, where A., a farmer, executed a bill of sale of all his property absolutely to B., for a debt of 600*l.*, B. put his son into possession, A. continuing to manage the farm, a short time after execution was issued against the stock, at the suit of C., against A. After satisfying the execution, it was questionable whether enough remained to cover the debt due to B.; it was held that the jury, allowing for the fluctuation in the market, were warranted in finding that



**Wager.**

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**I. RELATIVE TO WHEN, OR WHEN NOT, LEGAL.**

(A) IN GENERAL, p. 348.

(B) — PARTICULAR.

(a) *By statute.*

1st. On ships, p. 350. 2nd. On lives, p. 350. 3rd. At horse races, p. 351. 4th. Gaming, p. 351.

(b) When contrary to public policy, p. 351. (c) When leading to improper inquiries, p. 353. (d) When injurious to third persons, p. 353.

**II. RELATIVE TO THE ACTIONS FOR THE RECOVERY OF, p. 353.****I. RELATIVE TO WHEN, OR WHEN NOT, LEGAL.**

(A) IN GENERAL.

1. **MURRAY V. KELLY.** M. T. 1784. K. B. Cited Selw. N. P. 1341.

On a rule to show cause why the defendant should not be discharged on fixing common bail, on the ground that the action was on a wager, whether A. kept a military academy at such a place, or not, A wager on a private event is not illegal.\*

Lord Mansfield said that, as it was merely a wager on a private event, he saw no reason why it should not be considered as a legal debt, and the rule was discharged.

2. **JONES V. RANDALL.** E. T. 1774. K. B. Cowp. 37.

Assumpsit upon a wager, whether a decree of the Court of Chancery would be reversed on an appeal to the House of Lords. The decree was reversed, whereupon the plaintiff brought this action, and obtained a verdict for fifty guineas, the amount of the wager laid. As on the result of an appeal from the Chancery to the Lords.†

Lord Mansfield. The question is, whether this wager is against principles of morality, or contrary to sound policy. But it must not be against principles of sound policy, for many contracts, which are not against morality, are still void as against the maxims of sound policy. With respect to the first question, Whether it is against morality? The contract is equal between the parties; they have each of them equal knowledge or equal ignorance, and it is concerning an event which, reasoning by the rules of predestination, is to be sure so far certain, that it must be as it should afterwards happen to be. But it is a future event equally uncertain to the parties, whether the House of Lords would be of the same or a different opinion with the Chancellor; the presumption, if any is rather against the person betting in opposition to the Chancellor's judgment. The second question is, Whether this contract is against sound policy? and, supposing it clear of all the circumstances before mentioned, such as its being upon equal terms without fraud, and with a view only of securing something to the appellant in case the decision went against him, I profess that, even independent of those circumstances, I feel no objec-

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the goods, at the time of executing the bill of sale, were not worth more than 600*l.* and that therefore it was made *bona fide*, and that A. was entitled to recover to the amount of 600*l.* against the sheriff; 2 Marsh. 427.

Those transactions or dispositions of property which are avoided, as well against those creditors whose debts are contracted subsequently to such deeds, as against those creditors whose debts were in existence at the execution of the deeds; and the subject of such fraudulent disposition is thrown into assets, and all the subsequent creditors are let in; 12 Ves. 155; 2 Atk. 601; 2 Vern. 261.

\* In general, a wager is legal if it be not an incitement to a breach of the peace, or to immorality, or if it do not affect the feelings or interest of a third person, or expose him to ridicule, or libel him, or if it be not against sound policy; 3 T. R. 693. To constitute a valid wager it must be mutual: hence a wager lawful on one side and unlawful on the other is void; Clayton v. Jennings, 2 Bl. 705.

† Or to go a given distance in a chaise and pair of horses in a certain time is legal; Ximenes v. Jaques, 4 T. R. 499.

tion to it, in sound policy. From my own memory of this cause, if there ever was uncertainty in any case, it was in this.

3. *GOOD V. ELLIOTT*. T. T. 1790. K. B. 3 T. R. 693.

Or, whether one A. B. had not bought a certain article belonging to C. D.\* In this case the subject of the wager was, whether one S. T. had or had not, before a certain day, bought a waggon, lately belonging to D. C.; it was holden good by three justices, but Buller, J., was of a different opinion. 1st. On the ground that two persons shall not be permitted by means of a voluntary wager to try any question upon the right or interest of a third person; and 2ndly, that all wagers, whether in the shape of a policy or not, between parties not having any interest, were prohibited by stat. 14 Geo. 3. c. 48.

4. *GILBERT V. SIKES*. T. T. 1814. K. B. 16 East, 150.

But where it was to pay certain sums per day as long as Bona parte lived, it was holden illegal.† Action for one hundred guineas. It appeared that defendant had agreed to pay the plaintiff a guinea a-day during the life of Buonaparte. The defendant paid the guinea a-day for some years, and then desisted. The jury having found a verdict for the defendant; on motion for a new trial, it was contended in support of the verdict that the wager was illegal, inasmuch as it had a tendency to create an interest in the plaintiff in the life of a foreign enemy, and which in the case of invasion might induce him to act contrary to his allegiance. The Court being of opinion that the justice of the case had been satisfied, they refused to disturb the verdict. Lord Ellenborough, C. J., expressed a strong opinion against the legality of the wager, as well on the ground before mentioned as also on the ground that the party suffering under such a contract might be induced to compass and encourage the horrid practice of assassination, in order to get rid of a life so burthensome to him.

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(B) IN PARTICULAR.

(a) *By statute.*

1st. *On ships.*

*KENT V. BIRD*. E. T. 1777. K. B. Cowp. 583.

The 19 G. 2. c. 37.‡ prohibits wagers on ships. An agreement in writing was made, that plaintiff should pay the defendant 20l. at the next port a ship should reach; in consideration whereof, the defendant undertook that the ship should save her passage to China that season, and if she did not, that he would pay the plaintiff 1,000l. at the end of one month after she arrived in the Thames. It was holden that the agreement being made without reference to any property on board, although it appeared that the plaintiff had some little interest in the cargo, was a wagering policy, within the meaning of the 19 Geo. 2. c. 37.

2nd. *On lives.*

1. *ROEBUCK V. HAMMERTON*. H. T. 1778. K. B. Cowp. 737.

A wager between two uninterested persons upon the sex of a third is illegal by the 14 Geo. 3. against wagering policies. The 14 Geo. 3. c. 48. s. 1. enacts, that insurances made on the life of any person, or any other event, wherein the person for whose use such policy shall be made shall have no interest, or by way of gaming or wagering shall be void. The second section directs that, in all policies on lives or other events, the names of the persons interested shall be inserted. In this case a question arose, whether a policy upon the sex of a person is a wagering policy within the stat. 14 Geo. 3. c. 48. It was insisted the statute did not extend

\* So, in *Husse v. Crickett*, 3 Campb. 168. a wager of a rump and dozen whether the defendant was older than the plaintiff, was holden to be legal. And so in the *Earl of March v. Pigot*, 5 Burr. 2802. where two heirs apparent betted on the lives of their respective fathers, no objection was made to the subject of the wager; and it was further holden, that the circumstance of one of the fathers being dead at the time when the wager was made, but of which circumstance the parties were ignorant, did not affect the validity of the wager.

† Though in a former case, *Allen v. Hearn*, 1 T. R. 56. where a wager was laid that Charles Stuart would be King of England within twelve months next following, he then being in exile, it was holden good.

‡ Was made to prevent the taking a policy of insurance into every contract; which statute, after enumerating in the preamble the various frauds and pernicious practices introduced by the perversion of this species of contract, and among others, that of gaming or wagering, under pretence of insuring vessels and proceeds under general words, to prohibit all contracts of insurance by way of gaming or wagering; see also ante, tit, Insurance.

to this case; that it was not only not a policy, but the subject matter itself incapable of insurance, and that the nature of the act, not the form of the instrument, ought to decide, but this was a mere wager reduced into writing, not upon any future contingency, but upon a fact then existing, and therefore to construe it a policy within the meaning of the statute would be to extend the act to all wagers, where the parties for greater security might think proper to reduce them into writing.

Lord Mansfield stopped the counsel for the defendants, saying it was too clear to give themselves any trouble. The parties themselves have called it a policy, it is endorsed a policy, opened as a policy, and any number of persons whatever might have subscribed it as such. Therefore it is clearly within the act, and a nonsuit ought to be entered. *Per Cur.* Let a nonsuit be entered.

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## 2. GOOD V. ELLIOT. T. T. 1790. K. B. 3 T. R. 693.

On the construction of the 14 Geo. 3. c. 48; Kenyon, C. J., Grove, and Ashhurst, Js., were of opinion that the preceding statute was confined to policies of insurance, and that from the words used in the second clause, it was apparent that the legislature had written instruments only in contemplation. But the construction which was put by Buller, J., on this statute was, that it had nothing to do with what, in the true sense and meaning of the word, is a policy; that is, a mercantile policy made an interest, but that it prohibited all wagers made on any event, in which the parties had no interest.

But it seems the statute only applies to written contracts,

3d. *At horse races.* See *ante*, tit. Gaming.

4th. *Gaming.* See *ante*, tit. Gaming.

(b) *When contrary to public policy.*

## 1. ALLEN V. HEARN. M. T. 1785. K. B. 1 T. R. 56.

In this case the question was, whether a wager between two voters, with respect to the event of an election of a member to serve in parliament, laid before the poll began, is legal. Lord Mansfield, C. J. Whether this particular wager had any other motive than the spirit of gaming, and the zeal of both parties, I do not know; but this question turns on the species and nature of the contract, and if that be in the eye of the law corrupt, and against the fundamental principles of the constitution, it cannot be supported by any court of justice. One of the principal foundations of this constitution depends on the proper exercise of this franchise, that the election of members of parliament should be free, and particularly that every voter should be free from pecuniary influence in giving his vote. This is a wager in the form of it by two voters, and the event is the success of the respective candidates. The success, therefore, of either candidate, is material; and from the moment the wager is laid, both parties are fettered. It is, therefore, laying them under a pecuniary influence, it is making each of them in the nature of a candidate. If this be allowed, every other wager may be allowed. But this is not all, a gaming contract should not be encouraged if it has a dangerous tendency. What is so easy, as in a case where a bribe is intended to lay a wager; it is difficult to prove that the wager makes him give a contrary vote to what he would otherwise have done, but still it is a colour for bribery. It has an influence on his mind. Therefore, in the case of Cowper, if the wager had been laid with a lord of parliament, or a judge, it would have been void from its tendency, without considering whether a bribe were really intended or not. This is of that nature, and therefore void.

A wager contrary to public policy is illegal, as on the event of an election for M. P.;

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## 2. HARTLEY V. RICE. T. T. 1809. K. B. 10 East, 22.

A wager, that the plaintiff would not marry within six years was holden to be void; for, although the restraint was partial, yet the immediate tendency of such contract, as far as it went, was to discourage marriage, and no circumstances appeared to show that the restraint in the particular instance was prudent and proper.

Or in restraint of marriage;

## 3. BROWN V. LEESON. T. T. 1797. C. P. 2 H. Bl. 43.

The declaration stated that a certain discourse was had and moved between the defendant and the plaintiff, on the number of ways of nicking seven on the

Or tending to public inquiry into mode of

playing an  
illegal  
game;

dice, allowing seven to be the main, and eleven to be a nick to seven. That the defendant asserted that there were no more ways than six of nicking seven on the dice, allowing seven to be the main, and eleven to be a nick; which assertion of the defendant the plaintiff denied, and thereupon both the plaintiff and the defendant agreed to refer and submit the determination of the said question in dispute to one Walter Payne. That thereupon, in consideration that the plaintiff, at the special instance of the defendant, had undertaken to pay him the sum of 105*l.* in case the said Walter Payne should determine that there were no more ways than six of nicking seven on the dice, allowing seven to be the main and eleven a nick to seven, he said the defendant undertook to pay the plaintiff the sum of 105*l.* in case the said Walter Payne should determine that there were more ways than six of nicking seven as aforesaid. That the said Walter Payne did determine that there were more ways than six of nicking seven, &c.; by means whereof, the defendant became liable to pay the plaintiff the said sum of 105*l.*; of all which premises defendant had notice. When the cause came on for trial, Lord Loughborough directed it to be struck out of the paper, as being of a nature highly improper to be made the foundation of an action, with a proviso that it should be restored in case the Court should, upon argument, be of a different opinion. Accordingly a rule was obtained to show cause why it should not be restored to the paper. But the Court said, the Lord Chief Justice did perfectly right in refusing to try this cause.—Rule discharged.

Or, on an  
abstract  
question of  
law in  
which the  
parties have  
no interest

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4. *HENKIN v. GUERAS*. M. T. 1811. K. B. 12 East, 247.

The Court will not try an action upon a wager, on an abstract question of law on judicial practice, not arising out of circumstances really existing, in which the parties have a legal interest.

(c) *When leading to improper inquiries.*

*ATHERFOLD v. BEARD*. T. T. 1788. K. B. 2 T. R. 610.

Wagers lead-  
ing to im-  
proper in-  
quiries rela-  
ting to the  
general im-  
portance of  
the country  
are illegal,  
as on the a-  
mount of  
the hop du-  
ties or any  
other  
branch of  
the reve-  
nue.†

*Assumpsit* upon a wager of five guineas, whether the Canterbury collection of the duties upon hops for the year 1786 would amount to more than the Canterbury collection for the preceding year. The plaintiff affirmed that it would; the defendant, that it would not. At the trial, evidence was given of the defendant's admission that he had lost the wager, on which evidence alone the verdict was given. On a rule to show cause why the verdict should not be set aside; Buller, J. This is the case of an idle wager between two persons who have no concern in the subject, to draw into question a matter that respects the interest and general importance of the country, and on that ground I think that the wager is illegal; I do not find that it has ever been established a position of law that a wager between two persons not interested in the subject matter is legal. If it were so by the law of England, we must be bound by it; if not, I should hold otherwise. Such a wager is not permitted by the laws of other countries, it is not allowed by the civil law, nor the law of Scotland, and a determination on that point which came from the Court of Sessions in Scotland was affirmed here in the House of Lords on an appeal; but, however the question may be as to wagers in general, the distinction which has been taken in former cases will govern this. What Lord Mansfield said in the case of *Murry v. Kelly*, *ante*, 348, is directly applicable to this; he said that that wager was good, because it was on a private event; from whence it is to be inferred, that in his opinion it would have been void had it been on a public event.

(d) *When injurious to third persons.*

\* And in a late case, *Gibbs, C. J.*, following the example of Lord Loughborough and Lord Ellenborough in the foregoing cases of *Brown v. Leeson*, and *Henkin v. Gueras*, refused to try an action upon a wager, whether an unmarried woman had had a child. An action cannot be maintained upon a wager on a cock fight, because it is a barbarous diversion, which ought not to be encouraged and sanctioned in a court of justice; and further, because it would tend to the degradation of the Court to entertain such inquiries.

† And where defendant had given a promissory note for the amount of the wager, it was holden plaintiff could not recover.

DA COSTA v. JONES. H. T. 1778. K. B. Cowp. 729.

Upon a voluntary wager between two indifferent persons, upon the sex of a Wagers in third, apparently a man having acted and continued to act as such in various public characters; the Court held it illegal, because such inquiry tends to in- third per-  
decent evidence, and it tends to disturb the peace of the individual and of so- sons, and  
ciety; but indecency of evidence is no objection to its being received, where leading to  
it is necessary to the decision of a civil or criminal right. indecent ev-  
illegal.

## II. RELATIVE TO THE ACTION FOR THE RECOVERY OF.\*

**Wagers.** See *Master and Servant; Ship and Shipping.*

**Writs.** See *ante*, tits. *Latitat; Middlesex, Bill of.*

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TION, p. 355.
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## I. RELATIVE TO THE AFFIDAVIT TO HOLD TO BAIL IN.†

## II. RELATIVE TO THE DIRECTION OF WRITS TO SHER- IFFS IN. See *ante*, tits. *Original Writ; Sheriff.*

## III. RELATIVE TO THE VENUE CONNECTED WITH.‡ See *post*, div. X. *Costs*; and tit. *Venue.*

## IV. RELATIVE TO CERTIORARI CONNECTED WITH.§

\* Before the time of Holt, C. J., it was a question whether a general indebitatus assumpsit would not lie for a wager; it was, however, finally agreed that it would not: Carth. 338; 1 Ld. Raym. 69; but although an action does not lie in that particular form, yet a special assumpsit on the wager itself, laid by the way of mutual promises may be maintained.

† In Wales, a defendant shall not be holden to bail upon process issuing out of the Courts at Westminster, unless an affidavit that the cause of action amounts to 20l. or upwards be first made and filed; 11 and 12 W. 3. c. 9. s. 2; 2 Stra. 1102; Barnes. 69. 89.

‡ Hertfordshire is the next English county to South, Salop to North Wales; Dee, d. Richards, v. Willens, 2 M. & S. 270.

§ It seems to have been formerly holden that no certiorari lies to Wales in civil cases, Gilb. Execut. 201; and it cannot be had as a matter of course, unless a special ground be laid, as that the case strongly calls for a trial at bar. By the stat. 1 Geo. 4. c. 87. s. 5. it shall not be lawful for the defendant to remove any action of ejectment commenced by a landlord, under the provisions of that act, from of the Court of Great Sessions, Wales, to be tried in an English county, unless such Court of Great Session shall be of opinion that the same ought to be so removed, upon special application to the Court for that purpose. And where a certiorari, issued to remove a cause from the Court of Great Sessions in Wales, without any special ground for so doing, and without any notice having been given to the opposite party, but was not delivered to the judges of that Court till the day before the trial would in course have taken place, and after great expenses had been incurred;

## [ 355 ] V. RELATIVE TO PLEADING TO THE JURISDICTION.

LAMPLEY v. THOMAS. H. T. 1747. K. B. 1 Wils. 195.

A plea that the cause of action arose in Wales is good. On a plea to the jurisdiction of the K. B. in Wales, the case was argued most fully three times at the bar. The Court ordered this case to stand over for judgment; and some of the parties either died, and the suit abated, or the clerks of the Office of Pleas, in the Exchequer, who were much interested in this question, and were afraid the Court would overrule the plea, put an end to his cause, but a new action was forthwith brought in the name of Jones v. Jones, wherein there were exactly the same pleadings as in the case of Sampley v. Thomas, which was argued at the bar at the last term; but, as the subject had been quite exhausted before, nothing more that was new could be said upon it, and so the Court, in this present term, gave judgment for the defendant, and allowed the plea, without saying more than these words; "Breve domini regis de latitat non currit in Wallia."

VI. RELATIVE TO THE JURY PROCESS. See *ante*, tit. Issue; Jury.

## VII. RELATIVE TO THE TRIAL.\*

VIII. RELATIVE TO THE WITNESSES. See *post*, tit., Witness.

## IX. RELATIVE TO THE JUDGMENT.†

## [ 356 ] X. RELATIVE TO THE COSTS.‡

## XI. RELATIVE TO THE EXECUTION.§

XII. RELATIVE TO ERROR FROM. See *ante*, tit. Error Writ of.

## Warrant.

## I. RELATIVE TO WHEN A WARRANT IS, OR IS NOT, ESSENTIAL, p. 356.

## II. THE MODE OF OBTAINING IT, p. 357.

## III. BY WHOM GRANTED, p. 357.

## IV. WHOM DIRECTED, p. 358.

The Court of K. B. under these circumstances not only quashed the certiorari and directed a procedendo to issue, but ordered that the party who issued it should pay to the opposite party the costs incurred by the latter in the court below, together with the costs of the application.

\* In ejectment for lands in Cardiganshire, the venue was awarded out of Shropshire, upon a suggestion of it being the next English county: the Court, after verdict for the plaintiff, arrested the judgment on the ground of a mis-trial, Herefordshire being the next adjoining English county to South Wales, although it appeared that Shropshire was in fact nearer to the land in question, and the cause might have been more conveniently tried there than in Herefordshire; see also 21 Jac. 1. c. 23; 16 & 17 Car. 2. c. 8.

† The relation of judgment at common law to the first day of the term is taken away against purchasers by the statutes of frauds and perjuries, 29 Car. 2. c. 3. s. 14, 15. extended to Wales and the counties palatine by the 6 Geo. 1. c. 25. s. 6; 2 Saund. 7; Sudg. V. & P. 446, 447.

‡ In all personal and transitory actions brought in any of his Majesty's courts of record out of the principalities of Wales, where the debt or damages found by the jury shall not amount to 50l., and it shall appear upon evidence that the cause of action arose in Wales, and that the defendant resided within Wales at the time of the service of the writ; upon such fact being suggested on the judgment roll, and testified under the hand of the judge upon the back of the record of Nisi Prius, a judgment of nonsuit may be entered, and the plaintiff shall pay the defendant his costs (the plaintiff's debt or damages being first deducted therefrom), unless the judge also certify that the freehold or title to the land mentioned in the declaration was chiefly in question, or that the cause was proper to be tried in an English county; 5 Geo. 4. c. 106. s. 21, 22. In the taxation of costs for the defendant in this case, the Master shall allow the plaintiff the sum given him by the verdict out of the defendant's costs; Id. 6: see T. R. 500; New Rep. 267.

§ A testatum fieri facies may be award into Wales; 2 Tid. 1062.

- V. RELATIVE TO THE FORM AND REQUISITES OF, p. 858.
- VI. \_\_\_\_\_ BACKING OF, p. 359.
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# I. RELATIVE TO WHEN A WARRANT IS, OR IS NOT, ESSENTIAL.\*

## II. RELATIVE TO THE MODE OF OBTAINING IT.†

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## III. RELATIVE TO BY WHOM GRANTED.

REX v. KENDAL. M. T. 1791. K. B. 1 Ld. Raym. 65 S. P. REX v. WILKES. E. T. 1763. K. B. 2 Wils. 151.

Upon a *habeas corpus*, directed to the keeper of Newgate, to bring the bodies of the defendants to the King's Bench, he returned that the defendants were committed to his custody by warrant of Mr. Secretary Trumbull, for high treason, in aiding and assisting Sir James Montgomery to escape, A warrant may be granted by the secretaries of state.‡

\* When the party suspected of having committed an offence is at large, he may, in some cases before an indictment has been found, be apprehended, either without warrant, by a private individual, or by a constable, or other officer, ex officio. This summary course is necessary when there is an imminent danger of an escape, or when, from other circumstances, the utmost promptitude is requisite, or under a warrant granted by a justice of the peace, or a judge, or the secretary of state: and, if the supposed offender be in custody on a civil suit, he may be charged criminally under such warrant, though he cannot be taken by its authority out of the custody of the Court, and sent to the county gaol; 2 Stra. 828; 1 Wms. J.; Barnard, 129. Arrest; 2 Barnard, 114. But, whenever the case will admit, it is more prudent to obtain the authority of a magistrate, to give greater security to the parties by whom the arrest is to be effected; 1 Chitty on Crim. Law. 15. It is in general better to apprehend him by a warrant than for private persons or officers to arrest him of their own accord; because, if the justice should grant his warrant erroneously, no action lies against the party obtaining it; 3 Esp. 166, 167; 1 Chitty on Com. Law. 19. And, if a magistrate exceed his jurisdiction, the officer who executes a warrant is protected from liability, and the magistrate himself cannot be sued until after a month's notice of action, during which he may tender amends, 24 Geo. 2. c. 44; and no action can be supported against the party procuring the warrant, though the arrest was without cause, unless it can be proved that the warrant was obtained maliciously; 1 T. R. 535; 3 Esp. Rep. 135.

† The party who knows or suspects that an indictable offence has been committed usually goes before a justice of the peace, accompanied by any other witnesses whom he may be able to procure, and gives the magistrate his information, and that of his companions, stating the grounds of suspicion on his application is grounded. When the offence is between party and party, and not of an aggravated nature, and the supposed offender is not likely to abscond, a summons is recommended as the preferable process to procure his attendance, and this seems necessary where there is no oath of the offence having been committed; 2 T. R. 225; Comb. 359; Dick, J., Warrant, 11; 2 Barnard, 34. 77. 101. But, where there is an accusation on oath of an offence of a higher nature, as treason or felony, it is proper to issue a warrant in the first instance, if there appear any reasonable ground for the charge.

With respect to the evidence on which a warrant may be granted, a secretary of state may commit without oath; 1 Stra. 3; Com. Dig. Imprisonment, H. 7; 11 Sc. Tr. 316; 2 Mils. 286, 287; but a magistrate ought, unless he commits upon view of the offence, to examine upon oath the party requiring a warrant, as well to ascertain that a felony or other crime has actually been committed, as also to prove the cause and probability of suspecting the party against whom the warrant is prayed; 1 Hale, 582; 2 Hale, 110, 111; 4 Bla. Com. 290; Hawk, b. 2. c. 13. s. 18; 2 T. R. 225; Comb. 359; Dick, J., Warrant, 1. And it is the duty of the magistrate well to consider all the circumstances sworn to, and not to grant any warrant groundlessly or maliciously, without such a probable cause as might induce a discreet and impartial man to suspect the party to be guilty; Hawk, b. 2. c. 13. s. 18; Dick, J., 428, 459.

‡ And, by the Speaker of the House of Commons, 14 East, 1. 163. or Lords, 8 T. R. 314; by Justices of Gaol Delivery, 1 Leach, 116; or Oyer and Terminer, 1 Hale, 579; 2 Hale, 106; Justices at Sessions, 1 Hale, 579; or by a judge of the Court of King's Bench; 1 Hale, 578; 2 Hale, 5 & 6; 2 Barnard, 28; 48 Geo. 3. c. 58. s. 1; but warrants are most

[ 358 ] who was committed to the custody of a messenger on suspicion of high treason. To exception, that a secretary of state cannot commit,

Holt, C. J., was of opinion that, supposing the crime to be high treason, two things should have been specified in the warrant of commitment: 1. For what treason Sir James Montgomery was committed, for he who breaks the prison is guilty of the specific treason. 2. It ought to have been averred that Sir James Montgomery committed the fact, because the breaking of the prison is affected with the same offence; and, therefore, for this defect the prisoners were bailed.

Where the right of issuing a warrant is granted by statute, with out stating to whom to be directed, its direction should be to the constable and not to the sheriff.

IV. RELATIVE TO WHOM DIRECTED.\* See also *ante*, vol. vi. 132. REGINA V. WYATT. T. T. 1774. K. B. 2 Ld. Raym. 1192; S. C. 2 Salk. 381.

Per Powell, J. Warrants must be directed to the constable, since justices of peace cannot command the sheriff, unless power is given them so to do in the act of parliament.

#### V. RELATIVE TO THE FORM AND REQUISITES OF†

usually issued by a single justice of the peace: 4 Bla. Com. 290; 1 Hale, 579. And this he may do in any case where he has a jurisdiction over the offence; and in all treasons, felonies, and breaches of the peace, or offences for which the party is punishable with corporal punishment within the places over which his jurisdiction extends, 1 Hale, 579; 2 Hale, 107; 12 Co. 131; Dick. Sess. 88; Dalt. J. c. 70. & 170; Hawk. b. 2. c. 13. s. 15 & 16; 4 Bla. Com. 290; and, though justices of the peace have no jurisdiction over treason, yet, in order to secure a supposed offender, a justice may issue a warrant, and commit him for such offence; Hurn., J., 188, 189.

\* The warrant may be directed to the sheriff, bailiff, constable, or to any indifferent person, by name, who is no officer, for the justice may authorize any person whom he pleases to be his officer, but it is most advisable to direct to the constable of the precinct wherein it is to be executed, because no other constable, and *a fortiori* no private person, is compellable to execute it, whereas the constable of the proper precinct may be indicted if he do not obey the warrant; 1 Hale, 581; 2 Hale, 110, 111; Hawk. b. 2. c. 13. s. 27; 1 Salk. 347; 1 Md. Raym. 66; 2 Ld. Raym. 119; Com. Digest, Imprisonment, H. 7; 4 Bla. Com. 29; Dick, J., Warr. 111. Arrest, 11.

† It is generally laid down that the warrant ought to be under the hand and seal of the justice who makes it; 1 Hale 577; 2 Hale, 111; Com. Dig. Imprisonment, H. 7; Hawk. b. 2. c. 12. s. 21; 4 Bla. Com. 290; 2 Saund. 305; but it seems sufficient if it be in writing, and signed by him, unless a seal is expressly required by a particular act of parliament; Willis Rep. 414; Bul. N. P. 83; Burn, J.; Warrant, 4; Dick, J., Warr.; 3 Toome, 450. It is said that the warrant ought to set forth the year and day wherein it is made; Hawk. b. 2. c. 13. s. 22; 2 Hale, 111; Burn, J., Warrant, IV.; Dalt. J. c. 174; but that the place, though it must be alleged in pleading, need not be expressed in the warrant; but that it is necessary to state the county in the margin at least, if it be set forth in the body; Hawk. b. 2. c. 13. s. 22; 2 Hale, 111; Burn, J., Warrant, IV. But the warrant of a justice need not be returnable at a time; Peake's Rep. 234; 4 Bla. C. 291; or place certain; 4 Bla. Com. 291. It may be made either in the name of the king, 2 Ld. Raym. 1195; or of the justice himself; but the latter is most usual, though process after indictment issued from sessions of the peace is said always to be in the king's name. The warrant may be either general, to bring the party before any justice of the peace in the county; or special, to bring him before the justice only who granted it. If the warrant direct the offender to be brought before any justice, the election of the magistrate before whom he shall be taken lies in the officer, and not in the prisoner, 1 Hale, 582; Fortescue, 143; where it is said that the officer has always a right to take the party before any justice. The name of the party to be apprehended should be accurately stated, and must not be left in blanks to be filled up afterwards, 2 Hale, 114; Foster, 812; though it may be inserted after the warrant is sealed by the magistrate before he delivers it over to the officer, 2 Leach, 929; 8 T. R. 455; 1 East, P. C. 324; but if the name of the party to be arrested be unknown, the warrant may be issued against him by the best description the nature of the case will allow, as "the body of a man whose name is unknown, but whose person is well known, and who is employed as a driver of cattle, and wears a badge No. 573;" 1 Hale, 577; Burn, J., Commitment, III. It is not usual to state any addition of place or degree in a warrant before indictment: but after indictment found both are usually stated as in the indictment. Where a married woman has committed an offence without her husband, the warrant should be only against her; 3 Burr. 1681. It does not seem to be absolutely necessary to set out the charge or offence or evidence, in a warrant to apprehend, though it is necessary in the commitment; and it has been observed that cases may occur in which it would be



## VI. RELATIVE TO THE BACKING OF.\*

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## VII. RELATIVE TO THE EXECUTION OF.†

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imprudent to let even the peace officer know the crime of which the party to be arrested is accused; 2 Wils. 153; Toone, 449. It is laid down, however, to be advisable, especially if the warrant be for the peace or good behaviour, to set forth the special cause on which it is granted, in order that the party may be provided at once before the justice with sufficient sureties; but that if it be for treason or felony, or other offence of an enormous nature, it is not necessary to state it, and that it seems rather to be discretionary than necessary to set it forth in any case; Toone, 449. A general warrant to seize and apprehend all persons suspected, without naming or describing any person in particular, is illegal and void for its uncertainty; for it is the duty of the magistrate, and not to be left to the officer to judge of the ground of the suspicion; 1 Hale, 580; 4 Bla. Com. 291; 1 Bla. Rep. 555; 2 Wils. 151; 3 Burr. 1767; Burn, J., Warrant, IV. And for the same reason, a warrant to apprehend all persons guilty of a crime therein specified is not a legal warrant, for the point upon which its authority rests is a fact to be decided on a subsequent trial, viz. whether the person apprehended be really guilty or not; it is therefore in fact no warrant at all, for it will not justify the officer who acts under it. Upon the whole, therefore, it seems advisable in general to describe the supposed offence. General warrants to take up loose, idle, and disorderly people, 3 Burr. 1776; and search-warrants which will be hereafter considered, are the only exceptions to this rule; see div. IX. and tit. Vagrant. It seems, however, to suffice to state the particular species of crime, without showing the particular facts of that crime, as in a warrant for felony, it is not necessary to set out in the warrant the particular goods stolen; Fortes, 143; 2 Wils. 153.

\* The warrant of a judge of the Court of King's Bench extends over the whole realm: but that of a justice of the peace cannot be executed out of his county, unless it be backed, that is, endorsed by a justice of the county in which it is to be carried into execution; 2 Hale, 115. It is said that formerly there ought, in strictness, to have been a fresh warrant in every fresh county, but the practice of backing warrants has long been observed, and was at last sanctioned by stat. 23 Geo. 2. c. 26. s. 2. and 24 Geo. 2. c. 56; 4 Bla. Com. 291. The last of these acts, repealing the former, provides that a justice of the peace of the county or place where the person may be shall, upon proof being made upon oath of the hand writing of the justice granting the warrant, indorse his name, Burn, J., Warrant V.; upon which the offender may be apprehended and taken before the justice so endorsing the warrant, and (the word "and" seems to be omitted by mistake in this act, as may be collected from the 44 Geo. 3. c. 99. s. 1.) if the offence be bailable, he is to bail the party, and to deliver the recognizance, examination, or confession, and all proceedings to the constable, who is to deliver them to the clerk of the assize or clerk of the peace of the county in which the offence was committed.

† The officer to whom the warrant is directed should, as soon as he conveniently can, proceed with secrecy to find out and actually arrest the party, not only in order to secure him, but also to subject him and all other persons to the consequence of escape or rescue; and if he refuse or neglect to execute the warrant, he will be punishable for his disobedience or neglect, Hale, 581; but at some of the police offices it is the practice to deliver the warrants for common assault to one of the constables, who goes round to the parties accused, and states the time when they must go before a magistrate, in order that they may be provided with sureties. With respect to the person who may execute the warrant it seems that if it be directed to the sheriff, he may authorise others to execute it; but that if it be given to an inferior officer, he must personally put it in force, though any one may lawfully assist him, 2 Hale, 115; Bac. Ab. Constable, D.; and if a warrant be generally directed to all constables, no one can act under it out of his own precinct, and if he do he will be a trespasser; 2 H. Bl. 15. A warrant directed to several may be executed by one, 1 East, P. C. 320; but it is said that if it direct four jointly and not severally to arrest, then they must all be present; 2 Taunt. 161. When the officer employs others to assist him, he must be so near as to be acting in the arrest in order to render it legal; Cowp. 66; Dick. J. Arrest II. And he may not only demand the assistance of subjects in general, but may, if the warrant cannot be otherwise executed engage the assistance of the military; 14 East, 190. We have already seen that the warrant must be executed within the jurisdiction of the justice who issued or backed it; 5 East, 233. The arrest may be made in the night; 1 East, P. C. 324; 8 Taunt. 14. And though by stat. 29 Car. 2. c. 7. arrests in general are prohibited on a Sunday in case of treason, felony and breach of peace are excepted, 29 Car. 2. c. 7. s. 6; 1 East, P. C. 324; and in the construction of this statute it has been decided, that a person may be apprehended on a Sunday in an attachment for a rescue, Willes, 459; 1 T. R. 265; and as no time is usually prescribed in the warrant, it continues in force until fully executed, though it were even seven years after its date, during the life-time of the magistrate by whom it was originally granted, and a person may be twice apprehended under it if the purposes of justice have not been effected; Peake. Rep. 234. The officer must carefully observe the directions of the warrant, or he will be liable to an action, and not entitled to any protection under the provisions of

[VIII. RELATIVE TO THE ARREST ON, AND DETENTION  
IN CUSTODY AFTER.\*

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## IX. RELATIVE TO SEARCH WARRANTS.†

X. RELATIVE TO DISTRESS WARRANTS. See *ante*, tit. DistressXI. RELATIVE TO WARRANTS OF COMMITMENT. See *ante*,  
tit. Commitment.

stat. 24 Geo. 2. c. 44. If, therefore, he takes the wrong person, he will be a trespasser; Com. Dig. Imprisonment. H; 7. With respect to the right to break open doors, windows, &c. see *ante*. tits. Sheriff; Distress.

\* When the officer has made his arrest, he is as soon as possible to bring the party to gaol or to the justice, according to the import of the warrant; and, if he be guilty of unnecessary delay, it is a breach of duty; Fortes. 143; 2 Hale, 119. But if the time be unseasonable, as in or near the night, whereby he cannot attend the justice; or if there be danger of a rescue, or the party be ill, and unable at present to be brought, he may, as the case shall require, secure him in the stocks, or in case the quality of the prisoner or his indisposition so require, detain him in a house till the next day, or until it may be reasonable to bring him; 2 Hale, 119, 120. But if a constable, having arrested a party under a warrant, suffer him to go at large upon his promise to come again and find sureties, it is doubted whether he can afterwards be arrested on the same process, though it should seem that, as the public are interested in the offender's being brought to justice, there is no well founded objection to such second arrest, Bac. Ab. Constable, D.; and it is certain that, if the escape be made without the concurrence of the officer, the defendant may be retaken as often as he flies upon fresh suit, although he were out of view or had reached another county or district; Dalt. J., c. 169; Dick, J., Arrest III. It is also clear that if, after a departure by the permission of the constable, the party return into his custody he may lawfully detain him in pursuance of his original warrant; Hawk. b. 2. c. 13; Dick, J. Arrest, III. When the party accused is already in custody in the King's Bench or other prison in a civil action he may be there charged criminally by merely leaving with the gaoler the warrant of a justice of the peace or other magistrate, but such justice cannot take a prisoner out of the custody of the court, and send him to the county goal, 2 Strange, 828; for the prisoner, in such case, can only be removed under the authority of an *habeas corpus* issuing out of the Court of King's Bench.

† By stat. 22 Geo. 3. c. 58. s. 2; see also 30 Geo. 2. c. 24. s. 9; it is made lawful for any one justice of the peace, upon complaint made before him upon oath that there is reason to suspect that stolen goods are knowingly concealed in any dwelling house, or other place, by warrant under his hand and seal to cause every such place to be searched in the day time, and the person knowingly concealing the stolen goods, or in whose custody the same shall be found, being privy thereto, shall be deemed guilty of a misdemeanour, and shall be brought before any justice of the peace for the district, and made amenable to answer the same by like warrant of any such justice. There are other acts of parliament of a similar nature relative to coining, 11 Geo. 3. c. 40; having in possession naval and military stores, 39 & 40 Geo. 3. c. 89. and goods stolen from on board ships in the Thames, 2 Geo. 3. c. 28. s. 7; and to the taking of idle and disorderly persons; 19 Geo. 3. c. 10. But this act has expired, 1 Leach, 211. in order to recruit the land forces and marines. But a search warrant for libels and other papers of a suspected party is illegal, 2 Wils. 275; 11 St. Tr. 313. 321; for, as observed by Lord Camden, 11 St. Tr. 321, the difference between seizing stolen goods and private papers of the party accused is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall entitle me to restitution. In the other, the party's own property would be seized before, and without conviction, and he have no power to reclaim the goods even after his innocence is cleared by acquittal. The search warrant is not to be granted without oath made before the justice of a felony committed, and that the party complaining has probable cause to suspect they are in such a place, and showing his reasons for such suspicion; 2 Hale, 113. 150; 2 Wils. 283. 291. 292; 11 St. Tr. 321. The warrant should direct the search to be made in the day time, 2 Hale, 113. 150; 22 Geo. 3. c. 58. s. 1; though it is said that where there is more than probable suspicion, the process may be executed in the night; Dick, J., Bail; Burn, J., Williams, J., Search Warrant. It ought to be directed to a constable or other public officer, and not to a private person, though it is fit that the party complaining should be present and assisting, because he will be able to identify the property he has lost; 2 Hale, 150; 11 St. Tr. 321. It should also command that the goods found, together with the party in whose custody they are taken, be brought before some justice of the peace, to the end that, upon further examination of the fact, the goods and the prisoner may be disposed of as the law directs; 2 Hale, 150, 151. With respect to the mode of executing this warrant, if the door be shut, and upon demand not opened, it may be broken open, and so may boxes, after the

**Warrant of Attorney.**

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I. RELATIVE TO THE DEFINITION OF.\*

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II. RELATIVE TO THE STAMP.

BURTON v. KIRBY. M. T. 1816. C. P. 2 Marsh, 174; S. C. 7 Taunt. 174. *Per Cur.* A warrant of attorney may be stamped at any time, like other instruments.

keys have been demanded, and though the goods be not found, the officer will be excused, 2 Hale, 157; Doug. 359; 2 Wils. 284; 3 B. & P. 228; though if the party obtaining the warrant acted maliciously, he is liable to a special action on the case, but not to an action of trespass; 2 Hale, 151; Hawk. b. 2. c. 13. s. 17. n. 6; 3 Esp. Rep. 135. If, on the return of the warrant before the justice, it appear that the goods were not stolen, they are to be restored to the possessor; if it appear they were stolen, they are not to be delivered to the proprietor, but deposited in the hand of the sheriff or constable, in order that the party robbed may proceed, by indicting and convicting the offender, and have restitution. It is the duty of the officer to whom the warrant is addressed, or delivered to execute it within his district, without fee or reward; and, if he neglect or refuse, he would be punishable by indictment. The stat. 41 Geo. 3. c. 78. however provides that, when special constables shall be appointed in England to execute warrants in cases of felony, two justices may order proper allowances to be made for their expences and loss of time, which order shall be submitted to quarter sessions, and two justices are enabled by the same statute to order allowances to be made to high constables in England for extraordinary expenses incurred in the execution of their duties in cases of riot or felony.

\* A warrant of attorney is not in itself strictly a security, but is an authority addressed to one or more attorneys therein mentioned, authorizing them to appear in either of the courts at Westminster, and to confess a judgment in favour of some particular person in an action of debt, and usually contains a stipulation not to bring any writ of error, or to file a bill in equity, so as to delay him.

† A warrant of attorney to confess judgment need not be by deed: nor does it require an attesting witness; 5 Taunt. 264; and see 4 East, 431; 1 Chit. Rep. 707. This instrument was formerly liable to the stamp duty of ten shillings only, though it contained an

## III. RELATIVE TO WHO MAY GIVE.

## (A) FEME COVERT.

ROBERTS v. PIERSON. F. T. 1753. K. B. 2 Wils. 3.

A feme covert cannot execute a warrant of attorney.

The plaintiff, who was a married woman, entered into a bond as security for the defendant for 100*l.*, and by way of counter-security the defendant executed a bond and warrant of attorney to confess judgment to her, she having been obliged to pay 50*l.* for the defendant, entered up the judgment upon the warrant of attorney, and taken out execution thereupon. It was now moved to set the judgment aside, and to have the money paid into the hands of the sheriff restored to the defendant. *Per Cur.* A judgment at the suit of or against a *feme covert* is void, and so is her bond; and the money she paid for the defendant was her husband's and he may sue for it; so the judgment must be set aside, and the money in the sheriff's hands restored.

## (B) INFANT.

SAUNDERSON v. MARR. M. T. 1788. C. P. 1 H. Bl. 75.

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An infant cannot give a warrant of attorney.

*Per Buller, J.* If an infant give a warrant of attorney, it cannot be enforced.

(C) INSOLVENT DEBTOR. See *ante*, tit. Insolvent Debtor.

## (D) EXECUTOR.

OLWELL v. QUASH. M. T. 1716. K. B. 1 Stra. 20.

One of several executors cannot bind his co-executors by warrant of attorney.

There were three executors, one of whom gave a warrant of attorney to confess a judgment against himself and his co-executors, pursuant to which a judgment was entered against all the executors *de bonis testatoris* for the debt, and against the executor who gave the warrant *de bonis propriis* for the costs. Upon the motion to set this aside, it was held to be ill, for executors may plead different pleas, and that which is most for the testator's advantage shall be received; 1 Roll. Abr. 929. A. 1. B. 5.

(E) PARTNERS. See *ante*, tit. Partners.

## (F) PRISONERS.

1. HUTSON v. HUTSON. M. T. 1796. K. B. 7 T. R. 8.

When a prisoner executes a warrant of attorney his must be present; the plaintiff's attorney will not do;

A defendant in custody executed a warrant of attorney to confess a judgment: there was no attorney present on his part. The Court held the presence of the plaintiff's attorney insufficient, though the defendant consent to his acting as his attorney also.

authority to release errors; 4 East. 431. But it was afterwards made liable to the stamp duty of fifteen shillings; and, by the last general stamp act, 55 Geo. 3. c. 184. Sched. part 2. s. 3; and see the statutes, 44 Geo. 3. c. 98. Sched. part 2. s. 3. a warrant of attorney, with or without a release of errors, which is given as a security for the payment of any sum or sums of money, or for the transfer of any share or shares in any of the government or parliamentary stocks or funds, or in the stock and funds of the Governor and Company of the Bank of England, or of the East India Company, or South Sea Company, is subject to the same duty as a bond for the like purpose; save and except where such payment or transfer is already secured by a bond, mortgage, or other security, which has paid the *ad valorem* duty on bonds or mortgages; and also except where the warrant of attorney is given for securing any sum or sums of money, for which the person giving the same is in custody under an arrest; and, in those cases, it is subject to a duty of one pound. A defeasance, however, upon a warrant of attorney does not require a separate stamp from that upon the warrant of attorney; 1 New. Rep. C. P. 279.

\* And a joint warrant of attorney to confess judgment by an infant and another may be vacated against the infant only; 2 Bla. Rep. 1133.

† When the defendant is in custody by arrest, it is a rule of both Courts, R. E. 15 Car. 2. Reg. 4. C. P. "that no bailiff or sheriff's officer shall presume to extract or take from him any warrant to acknowledge a judgment, but in the presence of an attorney for the defendant, who shall subscribe his name thereto; which warrant shall be produced when the judgment is acknowledged; and if the bailiff or sheriff's officer shall offend therein he shall be severely punished. And no attorney shall acknowledge or enter, or cause to be acknowledged or entered, any judgment, by colour of any warrant gotten from any defendant being under arrest otherwise than as aforesaid. Upon this rule the defendant in the Common Pleas was held to be in custody, though the officer left him for sometime whilst the plaintiff got from him the warrant of attorney; Cas. Pr. C. P. 128. And in that court a defendant lodging within the rules of the Fleet, at the house of the officer who arrested him, and who was his security to the warden, was deemed to be a prisoner within the meaning of the rules; 2 Blac. Rep. 1297; and see *Id.* 1097. So, where a defendant, an

## 2. BARTON v. HANSON. T. T. 1809. C. P. 2 Taunt. 49.

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A prisoner on mesne process gave a warrant of attorney. The Court said the rule that his attorney must be present is not dispensed with, though the two other sureties not in custody join in the warrant.

## 3. BARNES v. WARD. M. T. 1737. C. P. Barnes, 42.

Rule to show cause why judgment on a *feri facias* should not be set aside, and restitution, no attorney being present at the execution of the warrant to enter judgment whilst defendant was in custody. It appeared that one who had served a clerkship (and was sworn an attorney soon after the execution of the warrant, and before the first motion made) was present, but this was held insufficient.—The rule made absolute.

## 4. BLAND v. PUKENHAM. M. T. 1722. K. B. 1 Stra. 530.

The Court held, that the presence of an attorney of C. B. at the execution of a warrant to enter up judgment in B. R. was sufficient.

being arrested at the suit of a third person, is taken to the house of a sheriff's officer, to whom he voluntarily offers to give a warrant of attorney, it is necessary for an attorney to be present on his part at the time of its execution; 2 Moore, 176; 8 Taunt. 283, S. C. But it having been deemed sufficient for the plaintiff's attorney to be present, and subscribe the warrant as attorney for the defendant, 2 Stra. 1245: another rule was made in the King's Bench, R. E. 4 Geo. 2. K. B. 2. Stra. 902; Cowp. 281; that "no warrant of attorney executed by any person in custody of the sheriff or other officer, for the confessing of judgment, shall be valid or of any force, unless there be present some attorney on the behalf of such person in custody, to be expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant of attorney before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof." And to prevent frauds and impositions in the execution of warrants of attorney for confessing judgments, a rule was made in the Common Pleas, that, "every warrant of attorney for confessing judgment shall be read over by the person who is to execute the same, or by some other person to him, before the execution thereof; and that if judgment shall be entered up on any such warrant of attorney, which shall not be so read over as aforesaid, such judgment upon motion may be set aside as irregular." R. T. 14 & 15 Geo. 2. C. P. But this latter rule appears to be disused; 2 H. Blac. 383.

\* The rules just noticed have been construed to extend to warrants of attorney executed abroad; 2 Stra. 1247.

† And in the Common Pleas, if the defendant himself be an attorney, or practise as such, it is deemed sufficient, though no other attorney be present on his behalf; Barnes, 37; Cas. Pr. C. P. 94. S. C. So a warrant of attorney given by a defendant in custody was in that court holden to be good where an attorney was present on his behalf, though he was a total stranger to the defendant, and introduced by the plaintiff's attorney, 4 Taunt. 497; these rules only extend to warrants of attorney given by a defendant in custody upon mesne process in a civil action to a plaintiff at whose suit he is in custody. Therefore where a warrant of attorney is given by a defendant in custody upon process of execution, 2 Stra. 1245; Cowp. 281; 1 Durnf. & East, 715; 7 Durnf. & East, 19. S. P.; or upon criminal process, 4 Durnf. & East, 433; or to a third person, at whose suit the defendant is not in custody; 5 Mod. 144; 2 Ld. Raym. 797; 3 Bur. 1792; Cowp. 142; 1 East, 241; 2 Moore, 175; 1 Cowp. 142; an attorney's presence is unnecessary.

And where a warrant of attorney was executed in the presence of an attorney's clerk, and it appeared from the defendant's affidavit that he was more induced to execute it because he had been informed that if he did execute it under an arrest, and without his attorney being present, it would be void, the Court refused to set aside the proceedings; Cowp. 142. On the other hand, though the case is not strictly within the rule, yet the Courts will sometimes interpose and give relief, under particular circumstances: for it is their province to guard against the arts of designing men, practised upon persons under the pressure of distress and imprisonment. Thus, if it could be shown that a party, even in execution, had been prevailed on to acknowledge a judgment for more money than was really due, the courts would give relief under the circumstances, Cowp. 281; because the cases of fraud and imposition are exceptions to all rules whatsoever. And in a case, 3 Durnf. and East, 616; and see 1 East, 242, a. where interlocutory judgment being signed against a prisoner in custody of the Marshal, the plaintiff's attorney took a cognovit from him for 200l., with a defeazance on paying 49l. (the real debt) and costs, but no attorney was present on the part of the defendant; though this case was not strictly within the rule, which only mentions prisoners in custody of sheriffs' officers, yet the court of King's Bench interfered for the relief of the prisoner. So, where a defendant, on being arrested by a sheriff's officer, gave a cognovit to the plaintiff who was attorney in the cause without an attorney being present on his part, such cognovit was holden void by the court of Common Pleas, although the plaintiff swore he did not know the defendant was in custody; 7 Taunt. 701; 1 Moore, 428. S. C.; and see 2 Taunt. 360; Arnold v. Lowe, T. 57 Geo. 3. C. P. 7 Taunt. 703. a. But in the King's Bench a cognovit given by a defendant in custody on mesne process, is valid, al-

Even tho' in Common Pleas two other persons not in custody join with him. The attorney's clerk is not sufficient;\*

But an attorney of a different court sufficient.†

## [ 366 ] IV. RELATIVE TO THE DEFEASANCE AND INDORSEMENT THEREOF, AND HEREIN OF THE FILING.\*

V. RELATIVE TO THE EXECUTION. See *ante*, Div. III. (F)

## VI. RELATIVE TO THE CONSIDERATION OF.†

## [ 367 ] VII. RELATIVE TO THE REVOCATION OF.

## (A) BY PARTY HIMSELF.

ODERS v. WOODWARD. E. T. 1701. K. B. 2 Lord Raym. 766; S. C. 1 Salk. 87; S. C. Mod. 73.

The party giving can not revoke his own warrant of attorney.

Holt, C. J., was of opinion, that a warrant of attorney to confess a judgment cannot be revoked by the party.

## (B) BY DEATH.†

## (C) BY MARRIAGE.

REYNOLDS v. DAVIS. E. T. 1698. K. B. 12 Mod. 383.

Marriage is no revocation of a

Warrant of attorney to confess judgment to *feme sole*, who married before judgment entered: whether it could now be entered, and how, was the ques-

though no attorney be present on the part of the defendant, unless it be shown that some undue advantage was taken of him; 1 Chit. Rep. 267.

\* This general authority is usually qualified by a written defeasance, stating the terms upon which it was given, and restraining the creditor from making immediate use of it, when it is intended to be so qualified, it is the duty of the attorney to indorse the terms of the defeasance; but his neglect to do so did not, until the recent act, 3 Geo. 4, c. 29, vitiate the security, 14 East, 576; but now by the act, in order to give publicity to the transactions and prevent fraudulent preference, if the defeasance be not indorsed within twenty-one days after the warrant of attorney is filed, the security is invalid, and all the warrants of attorney must be filed within twenty-one days after signed; or execution must be issued within that time, or the same will be void against assignees in case a commission of bankruptcy should issue.

† Every warrant of attorney should be given voluntarily, and for a good consideration; therefore, if a warrant of attorney be obtained by fraud, Doug. 196; 3 Taunt. 478; and see 4 Barn. and Ald. 691; or for a corrupt and usurious consideration, Cowp. 727; 1 Bos. and Pul. 270; 4 Barn. and Ald. 92; or for securing an annuity which is void by the Annuity act; or to induce the plaintiff to live in prostitution with the defendant, James v. Hoskens, T. 25 Geo. 3. K. B.; the courts will order it to be delivered up, and set aside the judgment and proceedings, if any, which have been had under it. And the court of King's Bench will set aside a judgment founded on an usurious security, without compelling the defendant to repay the principal and interest; 4 Barn. and Ald. 92. But in the Common Pleas, where securities had been acted on, and the money partly paid by the borrower, the Court would not set aside the judgment and execution on the ground of usury, but upon the terms of the defendant's repaying the principal and legal interest; 1 Taunt. 413.

† Upon a motion to enter up judgment on an old warrant of attorney, if it appears to the Courts that either party is dead, they will not grant the motion; 2 Str. 718, 1081; 8 Durnf. and East, 257; Vin. Abr. tit. Judgment, W. 7; Barnes, 270. Yet if the warrant of attorney be to enter up judgment at the suit of A., his executors or administrators, it seems that, on the death of A., the Court will give his executors or administrators leave to enter up judgment thereon; Barnes, 44, 45. And, if either party die in vacation within a year after giving the warrant of attorney, judgment may be entered up of course at any time after in that vacation; and it will be a good judgment at common law, as of the preceding term, though it be not so upon the Statute of Frauds in respect of purchasers, but from the signing; 1 Salk. 401; 7 Mod. 39 S. C.; Id. 93; 6 Durnf. and East, 368; 7 Durnf. and East, 20. And even where the party dies after the year, if the Courts can be prevailed upon to grant a rule for entering up judgment, they will not afterwards set it aside; 2 Str. 882, 1081; Vin. Abr. tit. Judgment, W. 7; Barnes, 270. When a warrant of attorney is given to enter up judgment at the suit of two persons, judgment may be entered up thereon, after the death of one of them in the name of the survivor; Barnes, 40; Id. 48; 1 Wils. 312; Say. Rep. 5; S. C. 2 Blac. Rep. 1301; 2 Maule & Sel. 76; 7 Taunt. 453; 1 Moore, 145, S. C.; but see Barnes, contra. And in the Common Pleas, where a warrant of attorney was given by two persons to enter up judgment on a joint bond against "me," not "us," the Court, after the death of one of them, gave leave to enter up judgment against the other; Barnes, 53; 1 Chit. Rep. 315, in notis; but see 7 Taunt. 453; 1 Moore, 145, S. C. But a joint warrant of attorney given to enter up judgment against us, upon a joint and several bond, will not in either court authorize the entering up judgment against the survivor only; 15 East 592; 7 Taunt. 453; 1 Moore, 145, S. C.; and see 1 Chit. Rep. 322, a. And a judge at chambers will never make an order for entering up judgment on a warrant of attorney against a surviving defendant.

tion? It was agreed it could not be entered for the husband, for that was beyond the authority given; the course is, to make affidavit of the debt not being satisfied, and now the wife could not make such affidavit, for the money might have been paid to the husband, nor could the husband's affidavit serve; because it might have been paid to the wife before marriage; but it seems that point may be cleared by a several affidavit of each in his time.

Holt C. J., said they had better enter it in the wife's name as *feme sole*, but nothing was done.

## VIII. RELATIVE TO THE CANCELLATION OF.†

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## IX. RELATIVE TO EFFECT OF BANKRUPTCY.‡

## X. RELATIVE TO THE STATUTE OF LIMITATION TO.§

## XI. RELATIVE TO ENTERING SATISFACTION.||

## XII. RELATIVE TO THE JUDGMENT.

[ 369 ]

### (A) WHEN TO BE SIGNED.¶

LUSHINGTON v. WALLER. M. T. 1788. 1 H. Bl. 94.

Judgment had not been entered within a year and a day, on a warrant, of an attorney given with a *post obit* bond, and the obligee did not apply to

\* And therefore, notwithstanding the marriage, judgment may be entered up in the names of the husband and wife. But, in order to warrant this entry, there should be a previous application to the Court, founded on an affidavit of the marriage; 3 Bur. 1471. And in an early case, 1 Show. 91; Say. Rep. 6; 3 Bur. 1470, S. C. cited, it was ruled upon motion; that if a woman give a warrant of attorney, and then marry, the plaintiff may file a bill, and enter judgment against both husband and wife, by the practice of the Court. But in a subsequent case, 1 Salk. 399; 7 Mod. 53, S. C. cited, it is said, that if a feme sole give a warrant to confess a judgment, and marry before it is entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband. Tamen quere, for it seems as reasonable that he should be charged in this case as for a bond or other debt, which he is liable for during the coverture, though not after; 1 Salk. 117, cites 1 Roll. Abr. 351, F.; 1 Geo. 2 F. N. B. 120, F.; and see 4 East, 522. In a still latter case, however, judgment was allowed to be entered up against husband and wife, on a warrant of attorney given by the *feme dum sola*; 2 Chit. Rep. 117.

Judgment ought to be signed with in a year and a day, otherwise leave of the

† Courts of equity cannot decree the cancellation of a warrant of attorney, which is an instrument quite the creature of the courts of common law; they have no jurisdiction to order securities to be vacated, and the contracting party must, at the risk of losing the evidence which might establish his defence, wait till the party who holds the security thinks fit to try the validity of the instrument in an action at law, and should he be nonsuited, he will still be at liberty to proceed *de novo* upon his security; 8 Price, 534; 3 Merival, 226. Courts of law will grant relief in warrants of attorney on equitable grounds.

‡ As to executions upon judgments entered upon warrants of attorney or cognovits, they are by stat. 3 Geo. 4, c. 39, declared void as against the assignees under a commission of bankruptcy against the defendant, unless such warrant of attorney or copy thereof, or such cognovit respectively, have been filed in the manner pointed out by the statute, within twenty-one days from the execution thereof, or unless judgment be signed and execution issued within the same time.

§ A warrant of attorney is not within the Statute of Limitations, being in the nature of a specialty; 2 Stark. 234.

¶ By 3 Geo. 4, c. 39, s. 8, the judges are authorized to order a memorandum of satisfaction to be written upon such warrant of attorney, cognovit actionem, or copy thereof, respectively, if it shall appear that the debt for which such warrant of attorney or cognovit actionem is given as a security shall have been satisfied or discharged.

¶ Judgment may be entered up on a warrant of attorney at the time therein specified for that purpose; and if the warrant were given to secure the payment of money, it is not necessary that the plaintiff should delay the signing of the judgment until default be made in the payment, M. S. M. 1814. B. R. and see Hardw. 270; unless that be expressly stipulated in the defeazance; 2 B. & B. 464; 7 Taunt. 307. If the warrant specify any particular term of which the judgment is to be signed, it cannot be entered up of any other, even of a subsequent term; 1 Mod. 1; 7 Mod. 53; which exactness, however, is seldom requisite at present, for modern warrants of attorney, after spe-

Court must be obtained. The Court of Common Pleas for leave to enter it till after the death. The Court refused to suffer judgment to be entered without a rule to show cause.

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On signing judgment the authority given by the warrant of attorney must be strictly pursued; there fore, if judgment be entered up on

(B) HOW SIGNED.  
PARIS V. WILKINSON. H. T. 1799. K. B. 8 T. R. 153.

The defendant gave the plaintiff a warrant of attorney, empowering him to enter up judgment in an action of debt on bond, for 4,150*l.*; but the plaintiff entered up judgment for that sum, in an action of debt on a *mutuus*; on cifying the term of which judgment is to be signed, always add the words, "or of any subsequent term." It cannot, however, be entered up of a previous term, and even if the first day of the term of which the judgment is signed, and to which the judgment has relation, be previous to the time stipulated in the defeazance, &c., for the entry of the judgment, although judgment were not actually signed until afterwards, the Court would probably set aside the judgment; 2 Stra. 1128.

\* This application is founded upon an affidavit stating the consideration for the warrant of attorney, its execution, the amount remaining due to the plaintiff, 2 B. & C. 555. and alleging that the defendant was alive at a certain time therein mentioned; see the form of the affidavit, Arch. Forms. 336. If the application be by motion to the Court, it must appear from the affidavit that the defendant was alive upon some day within the term; R. T. 59 Geo. 3; 1 B. & B. 385. If the application be made to a judge in vacation, the affidavit must state the defendant to have been alive within two or three days, if he reside in or near London; or if he reside at a distance in the country, then within six or eight days, according to the distance. Judgment, however, may be allowed to be entered up against a defendant residing in Jamaica, upon an affidavit that he was alive five months before; Wiles, 66; Ca. Pr. C. B. 145; and against a defendant in New South Wales, upon an affidavit stating the receipt of a letter from that place in the August preceding, the application being made in November; 2 D. & R. 12. So where it appeared that the defendant was abroad, and his relations here would give no information concerning him, and there was no other person here to whom to apply, the Court allowed judgment to be entered up against him although some months had elapsed since he had been heard of; 2 Bing. 204. It must appear, also, that the deponent saw him at the time he is stated to have been alive, or that he received a letter from him in his hand-writing bearing date at that time, Bidlake v. Chester, M. S. E. 1824. R. R.; and therefore where the affidavit stated, that the deponent was stated by the defendant's wife that her husband was living, the Court of King's Bench held it to be insufficient; M. S. M. 1814. Where it appeared that after the affidavit was made, and before application for leave to enter up the judgment, the defendant died, and it was moved to set aside the judgment on this account, the Court said that, if they had been informed at the time that the defendant was dead, they certainly would not have given leave to enter up the judgment, but as no attempt to impose upon the Court had been practised in that particular case, they refused to interfere; Barnes, 270. The affidavit must also state the execution of the warrant of attorney, but where it stated that the defendant had recently acknowledged the execution of it, expressly for the purpose of enabling the plaintiff to enter up judgment without being at the trouble of sending for the subscribing witness, the Court held it to be sufficient; 2 B. & P. 85. If the attesting witness be dead, that fact must be substantiated by affidavit; or if he cannot be found, the affidavit must state the endeavours which have been made to find him before the Court will receive secondary evidence of the execution; 4 Taunt. 132. The consideration and the sum remaining due are usually sworn to by the plaintiff himself; but where the plaintiff was a lunatic, an affidavit of the debt being unpaid, made by a person who had received the interest due upon it for the last three years, was deemed sufficient; Barnes, 42. Also where the defeazance in the warrant of attorney stated that it was given to secure the payment of a sum upon demand, and in case of default, then judgment was to be entered



which execution was taken out; it was now moved to set aside the judgment and execution, on the ground that the judgment was not warranted by the power of attorney under which it was entered up. The Court was inclined to give the plaintiff leave to amend, but they made the rule absolute.

a mutuum instead of on a bond, it is irregular.\*

(C) WRIT OF ERROR ON.†

(D) EXECUTION ON.‡

[ 371.]

up and execution issued; the Court held that there should have been a demand to warrant the judgment and execution; 2 B. & B. 464. Where it appeared by the plaintiff's affidavit that she was then resident in an enemy's country, the Court of Common Pleas refused to give leave to enter up the judgment; 2 New. Rep. 97. If the application be not made within ten years, a judge will not make an order, but you must apply to the Court. If twenty years or upwards have elapsed since the execution of the warrant, the Court will only grant a rule nisi, 1 Sellon, 382; but if the application be made within twenty years, the rule will be absolute in the first instance. Yet where the warrant had been given with a *post obit* bond, and the application was not made until after the death of the person upon whose death the bond was payable, the Court granted a rule nisi only; 1 H. Bl. 94. Though if the judgment on an old warrant of attorney happen to be entered up without the leave of the Court, none but the defendant himself can object to the irregularity; 7 D. & R. 558.

\* So, a general warrant given by a person who afterwards became insolvent will not authorize the plaintiff to enter up a special judgment against his future effects; 1 T. R. 80. Or if a warrant be given to confess a judgment of a particular term, judgment cannot be entered up of any other term. So, upon a joint warrant of attorney given by two, judgment cannot be entered up against one even after the death of the other; 7 Taunt. 453; 15 East, 529. So, a warrant given by one of two executors will not authorise the plaintiff in entering up judgment against both; 1 Str. 20. Also, where, on a warrant of attorney given to an executor, judgment was entered up in vacation as of the previous term, when the testator himself was alive, the Court set it aside for irregularity; 2 Stra. 1121. Or, if the declaration be upon a bond purporting to bear date after the first day of the term of which the judgment was signed, the judgment will be erroneous; 7 Mod. 38. Yet where a judgment creditor applied to set aside a judgment and execution against the debtor, upon the ground that the judgment was entered up against the defendant by a different Christian name from that signed by the warrant of attorney, the Court refused even a rule nisi; M. S. M. 1815; and see 7 B. & C. 286.

Where leave of the Court is necessary before judgment can be entered, an affidavit must be made; see *ante*, 369. And by a late rule of all the Courts, R. M. 42 Geo. 3. 2 East, 136; K. B., R. M.; 43 Geo. 3. 3 Bos & Pul. 310; C. P.; R. M., 43 Geo. 3. in Scac. Man. Ex. Append. 224, 225; 8 Price, 505. "No judgment can be signed upon any warrant authorizing an attorney to confess judgment, without such warrant being delivered to and filed by the clerk of the dockets or Master in the Exchequer, who is ordered to file the warrants in the order in which they are received;" see also 3 Geo. 4. c. 39, s. 1.

† Since the warrant of attorney authorizes the attorney to execute a release of error, if defendant, notwithstanding, bring error upon the judgment, 8 Taunt. 434; the Court, upon application, would probably quash the writ of error.

‡ As soon as judgment is signed, the plaintiff may immediately sue out execution, if he be at liberty to do so by the terms of the defeazance. A writ of execution, however, may be sued out before, but it cannot be executed until, on, or after the day specified for that purpose in the defeazance; M. S. M. 1814. B. R.; Hardw. 270. Where the warrant of attorney was given for securing the payment of an annuity, the plaintiff sued out execution, and arrested the defendant for the amount of the penalty, the Court of King's Bench set aside the execution, and ordered the defendant to be discharged, as the defeazance authorized the plaintiff to take out execution merely for the arrears; 16 East, 163. The plaintiff in this case should have sued out execution for the amount of the penalty, because the writ of execution must strictly pursue the judgment, but should have endorsed

(E) SCIRE FACIAS CONNECTED WITH.\* See also *ante*, tit. Scire Facias.

**Warranty.** See also tits. *Deceit; Insurance; Vendor and Purchaser.*

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### I. RELATIVE TO THE DEFINITION OF.†

II. RELATIVE TO THE STAMP ON. See *post*, div. Evidence VIII. (b); and *ante*, tit. Contract.

### III. RELATIVE TO IMPLIED WARRANTIES.

1. PARKINSON v. LEE. H. T. 1801. K. B. 2 East, 314.

In general  
no implied  
warranty  
arises;‡

Upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, the Court said that the law did not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price were given; and therefore, if there be a latent defect then existing, unknown to the seller, and without fraud on his part, but arising from the fraud of the grower from whom he purchased, such seller is not answerable though the goods turned out to be unmerchantable.

it to levy the amount of the arrears only. But where a warrant of attorney was given for the payment of money by instalments, and by the terms of the defeasance the plaintiff was to be at liberty to enter up judgment immediately, "but no execution to be issued until default made in payment of the said sum of 1,402l. 18s. 8d., with interest as aforesaid, by the instalments and in the manner herein beforementioned;" the Court of King's Bench held that the plaintiff, upon a fair construction of the above terms of the defeasance, was at liberty to sue out and execute a writ of execution for the entire sum, upon default of payment of any one of the instalments; 1 M. & S. 706.

\* Although a warrant of attorney be given to secure the payment of an annuity, or of a sum of money by instalments, or the like, it seems a scire facias is not necessary previously to suing out execution for every periodical payment or instalment, as would be the case if a bond only had been given; for it has been decided in several cases in this court, 2 Taunt. 195; 3 Taunt. 74; 5 Taunt. 264; and see 2 W. Bl. 845; and it seems also to be the opinion of the Court of King's Bench, M. S. E. 1814; and see 16 East, 163; that the stat. 8 and 9 W. 3. c. 11. s. 8. which requires suggestions of breaches, and a scire facias, does not extend to warrants of attorney, even when given merely as a collateral security with a bond; 2 Taunt. 195.

† A warranty is an indemnity against the consequences of any defect in the quality or value of the thing sold; Hence a representation made at the time of sale is a warranty if so intended, though the vendor is not in possession of the chattel; *Pasley v. Freeman*, 3 T. R. 57, 58.

‡ In contracts for the sale of personal property, the vendor impliedly warrants that the article he sells is his own, and if it prove to be otherwise he is liable for the breach of his implied promise, *Doug.* 18; or for the deceit, 3 T. R. 15. And this implied warranty arises whether the seller be in actual possession of the article sold or not; it has been supposed that there is an implied warranty of the goodness and worth of an article arising from the conditions of all sales, and this supposition is grounded upon the principles of natural justice and equity, which ought to govern all the contracts of men without reference to the particular quality of the thing for which they contract. But there is no such rule in the English law. It was formerly, indeed, a current opinion that what was termed a sound price was per se implication of warranty, but this doctrine has been long exploded, and there must be in general an express warranty as to the quality or value of a personal chattel in order to maintain the action; *Holt*, N. P. 632. An implication of warranty, however, may frequently arise from the wording or nature of the contract, or from the established or particular usage of trade, and this must of course depend on the nature

## 2. JONES v. BOUDEN. M T. 1808. C. P. 4 Taunt. 847.

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In this case it appeared that it was usual in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, and to mark the drugs which are repacked, or the packages of which are discoloured by sea water, bearing an inferior price, although not damaged. The defendants had purchased some sea-damaged pimento, repacked it, and advertised it in catalogues, which did not notice that it was sea-damaged or repacked, but referred it to be viewed, with little facility however of viewing it; they exhibited impartial samples of the quality, and sold it by auction; it was held that this was equivalent to a sale of the goods, and as for goods that were not sea-damaged, and that an action lay for the fraud.

Unless there is a fraudulent concealment.

## VI. RELATIVE TO EXPRESS.

## BUTTERFIELD v. BURROUGHS. T. T. 1705. K. B. Salk. 211.

An express warranty does not guard against that

The plaintiff declared that the defendant sold him a horse such a day, and at such a place, *adunc et ibidem, warrantinavit equam predict.*, to be sound wind and limb, whereupon he paid his money, and avers the horse had but one ture of each particular contract. If a contract described the goods as of a particular denomination, there is an implied warranty that they should be of a merchantable quality of the denomination mentioned in the contract; 4 Campb. 144; and where rye grass was bought to sow, and which the purchaser did not examine, and it did not grow, in consequence of a defect in the seed, it was held that the vendor could not recover the price from the purchaser. If goods sold are described in the invoice as scarlet cuttings, a warranty is to be inferred that the goods answer the known mercantile description of scarlet cuttings; 1 Stark. 504. So, where an advertisement for the sale of a ship described her as a copper-fastened vessel, adding that the vessel was to be taken with all faults, without any allowance for any defects whatsoever, and it appeared that she was only partly copper fastened, it was held that, notwithstanding the words "with all faults," &c. the vendee was liable for the breach of warranty; 5 B. & A. 240. So, in all contracts for the sale of provisions, it should seem that there was an implied warranty that they should be wholesome; and it has been held that the vendor of an article impliedly warrants that it shall answer the purpose for which it was sold, though this latter doctrine as a general rule seems questionable; 1 Stark. 384. An agreement between a brewer and a publican, that the publican shall take all his beer of the brewer, cannot be enforced unless the brewer supply the publican with good beer, such as ought to give satisfaction to his customers; 4 Campb. 144. If goods are ordered to be manufactured, a stipulation that they shall be proper and saleable is implied; and so it is in the sale of goods where opportunity of an inspection is given, and especially if the goods are for a foreign market. But if there be a latent defect in the thing sold, which defect is unknown to the seller, though a fair price be given by the buyer for the commodity, the law does not in general raise an implied warranty that it shall be merchantable; in a verbal sale by sample, it is an implied warranty that the thing sold corresponds with the bulk of the sample, 4 Campb. 169; but in a written contract of sale by sample, a stipulation must be inserted that the commodity corresponds with the sample, otherwise parol evidence is inadmissible to make such stipulation part of the contract; 2 Campb. 22. In an action upon a warranty of a chain cable, held that the plaintiff might recover the value of the cable, and also of an anchor, which, it was averred, was lost through the insufficiency of the cable, it being proved that the ship would have been endangered if it had not been shipped; Borradaile v. Brunton, 2 Moore. 582; 8 Taunt. 535. Where a purchaser kept the goods six months and sold part, the Court held that the jury had rightly inferred that the plaintiff knew of the inferiority of the article of which he then complained; Prosser v. Hooper, 1 Moore, 107.

\* Express warranties may be either general or special; as, relative to the subject matter of the contract, the advantage arising to the buyer from an express warranty to the quality or value of the commodity sold is, that such warranty extends to any defect in such quality or value known or unknown to the seller; and if the warranty be false, he has his remedy over against the seller, or may refuse to keep the commodity. In order to constitute an express warranty the declaration of the seller should be positive and explicit, and not a mere surmise or affirmation of his opinion; for if a man states what he believes to be true, giving the purchaser at the same time to understand that he has no absolute knowledge on the subject, it would be very hard if he should be held bound by such a representation, though the supposed incident or quality which he represented to belong to the subject, or some fact which he had stated concerning it, should be afterwards proved not to exist; where, therefore, a man on the sale of a horse referred to a written pedigree of the animal to ascertain his age, and at the same time stated to the buyer that he knew nothing more about it than what the pedigree disclosed, he was held not to be liable to an action on account of the pedigree proving false, of which fact the seller had no knowledge at the time of the sale, The

[ 374 ] eye, &c. The defendant pleaded *non warrantinavit*, upon which there was a verdict for the plaintiff; and now in arrest of judgment it was objected to, that the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities. But to this it was answered, and resolved by the Court, that this might be so, and must be so intended, since the jury have found the defendant did warrant.

#### V. RELATIVE TO THE TIME OF MAKING.

PASLEY v. FREEMAN. H. T. 1789. K. B. 3 T. R. 59. LYSNEY v. SIBLEY. H. T. 1703. K. B. 2 Ld. Raym. 1120.

A warranty made before the sale is obligatory.† Per Buller, J. If the warranty be made at the time of the sale, or before the sale, the sale is upon the faith of the warranty, I can see no distinction between the cases.

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#### VI. RELATIVE TO DISTINCT WARRANTIES.

BUCHANAN v. PARNSHAW. M. T. 1788. K. B. 2 T. R. 745.

A condition annexed to a warranty of soundness does not apply to one of age. A horse was sold at a public auction warranted sound and six years old, and one of the conditions of sale was that he shall be deemed sound unless returned in two days. The horse sold with this warranty was discovered to be twelve years old, ten days after the sale, and was then offered to the seller, who refused to take him; it was holden, that an action might be maintained by the buyer against the seller, and his right to recover was not affected by his having sold the horse after offering him to the defendant, since the condition of sale only applies to the warranty of soundness.

#### VII. RELATIVE TO INCIDENTAL RIGHTS CONNECTED WITH.

1. FIELDER v. STARKIN. T. T. 1788. C. P. 1 H. Bl. 17. CREWELL v. COASE. M. T. 1806. C. P. 1 Taunt. 566.

As soon as the fault appears the article ought to be tendered back.† In this case the buyer had kept the horse eight months, without giving any notice of the unsoundness, and before he had made an offer to return him.

Lord Loughborough, C. J., said, that no length of time elapsed after the sale would alter the nature of a contract originally false. Neither is notice

mere insertion of the name of an artist in a catalogue as the painter of any particular picture is not such a warranty as will subject the seller to an action if it turn out that he was mistaken; 1 Esp. N. P. C. 572. A future event may be warranted; Dougl. 735.

As if a horse be warranted perfect, and wants either an ear or a tail, unless the buyer in this case be blind. But if cloth be warranted to be of such a length, and is not, an action lies, for that cannot be discerned by sight, but only by measuring the cloth, and so it lies if to discern the defect some skill is required; 2 Bla. Com. 125. In fact, a horse being an animal subject to secret maladies, which cannot be discovered by a mere trial and inspection, it is usual, and in all cases prudent, for the buyer of a horse to require from the seller a warranty of its soundness; for if the horse having a secret malady is sold without a warranty of soundness, and without any fraud on the part of the seller, the purchaser is without a remedy. Formerly, indeed it was a current opinion that a sound price given for a horse was tantamount to a warrant of soundness, but it was observed by Grove, J., in Parkinson v. Lee, 2 East. 323. that when that doctrine came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord Mansfield, C. J., rejected it, and said that there must either be an express warranty of soundness or fraud in the seller, in order to maintain the action. The advantage arising to the buyer from an express warranty of soundness is this, that such warranty extends to every kind of soundness known and unknown to the seller; and if the warranty be false, the buyer has a remedy against the seller to recover a compensation in damages. Roaring is a malady which renders a horse less serviceable for a permanency, and therefore an unsoundness; Onslow v. Eames, 2 Stark. N. P. C. 81. But curb biting is not an unsoundness within general warranty.

† But if it be made afterwards, and not at the time of the sale, it is a void warranty unless in writing under a seal; and the warranty should always form a part of the contract; and where before, or at the time of the sale, a specimen or sample of the goods is exhibited to the buyer, if there be a written contract which merely describes the goods as of a particular denomination, this is not a sale by sample; 4 Campb. 174.

† But where there is an agreement to take a horse back on trial, and he shall be found faulty, though accompanied with an express warranty, yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse after trial. And it is

necessary to be given, though the not giving notice will be a strong presumption against the buyer that the horse at the time of sale had not the defect complained of, and will make the proof on his part much more difficult.

2. **BUCHANAN v. PARNSHAW.** M. T. 1788. K. B. 2 T. R. 745.

A horse was sold at a public auction warranted six years old, and sound; and one of the conditions of sale was, that the purchaser of any horse warranted sound, who shall conceive the same to be unsound, should return him within two days, otherwise he should be deemed sound. Ten days after the sale the plaintiff discovered that the horse was twelve years old, and offered to return him, but the defendant refused to receive him, and thereupon plaintiff sold the horse, and brought an action on the warranty against the seller. It was proved that the horse was twelve years old. The jury were of opinion that the plaintiff by not returning the horse sooner had made him his own, and gave a verdict for the defendant, but the Court set aside the verdict, and Lord Kenyon, C. J., observed, that the question turned on the condition of sale, which, in his opinion, ought to be confined solely to the circumstance of unsoundness; that there was good sense in making such a condition in a public sale, because, notwithstanding all the care that could be taken, many accidents might happen to the horse between the time of sale and the time when the horse might be returned if no time was limited, but the circumstance of the age of the horse was not open to the same difficulty.

And where a condition of sale was that it should be returned in two days, and the defect was not discovered for ten days, it was holden that the vendor might under circumstances be compelled to take it back.

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# VIII. RELATIVE TO THE BREACH OF.

## (A) HOW ADVANTAGE SHALL BE TAKEN OF BREACH OF.\*

### (B) ACTION FOR.†

#### (a) Declaration. See ante, div. IV.

1. **FIELDER v. STARKIN.** T. T. 1788. C. P. 1 H. Bl. 17.

A horse has been sold warranted sound, which turns out to be unsound at the time of the sale: the Court held the seller liable to an action on the warranty, without either the horse returned, or notice given of the unsoundness.

2. **BUTTON v. CORDER.** T. T. 1810. C. P. 7 Taunt. 405; S. C. 1 Moore, 109.

A declaration in an action on a warranty that the defendant "undertook he could warrant," was holden by the Court sufficient after verdict.

3. **WILLIAMSON v. ALLISON.** E. T. 1802. K. B. 2 East, 446.

In an action on the case, in tort for a breach of a warranty of goods, the Court held that the *scienter* need not be charged, nor, if charged, need it be proved. See ante, *tit. Deceit*.

4. **HENDS v. BUTTON.** T. T. 1810. K. B. 9 East, 349.

The declaration stated that, in consideration that the plaintiff would buy of expedient in all cases to give notice as early as possible of the unsoundness or defect complained of.

Before action no notice or tender seems essential. And stating that defendant "undertook he could warrant," suffices after verdict. The *scienter* when declaring in tort must be stated.

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And where the declaration

\* In contracts of manufacture there is an implied warranty that the article shall be saleable; though in contracts of sale there must, in general, be an express warranty. If the article to be manufactured be not made pursuant to the contract, the party ordering it is not bound to accept or to pay any thing for it; and it has been held, that where a builder undertakes a work of specified dimensions and materials, and deviates from the specification, he cannot recover either upon the agreement or the quantum valebant. But if the party waive the objection or accept the commodity in its incomplete shape, or encourage the manufacturer to proceed after he has broken the contract, then a fair remuneration for the work done is recoverable; 1 Stark. 275.

† Plaintiff sold the defendant a horse with a warranty of soundness; the defendant gave the plaintiff a bill of exchange for the price: the defendant discovering the horse to be unsound, tendered him to the plaintiff, but he refused to take it back again. An action having been brought by the plaintiff against the defendant on the bill, the defendant proved that the plaintiff at the time of sale knew that the horse was unsound. It was holden, that the plaintiff could not recover, for it was clearly a fraud, and a person cannot recover the price of goods sold under a fraud. Upon sale of a ship advertised as a copper fastened ship, with all faults; held, that these faults meant faults of a ship which might have been consistent with that description of vessel, and that not being a copper fastened ship at all, it was a breach of the warranty; *Shepherd v. King*, 3 B. & A. 240.

tion stated that the plaintiff had paid a certain sum, when in fact part had been paid, and an exchange for the remainder, it was held sufficient,

the defendant a horse for 31*l.* 10*s.*, to be paid by the plaintiff to the defendant, the defendant promised that the horse was sound, and that the plaintiff did buy of the defendant the horse for that price, and did pay to the defendant the said 31*l.* 10*s.*, and then alleged as a breach that the horse was unsound. It appeared in the proof that the defendant agreed to dispose of his horse, which he warranted sound, to the plaintiff for thirty guineas, but agreed at the same time that if the plaintiff would take the horse at that value, the defendant would purchase of the plaintiff's brother another horse for fourteen, and that the difference only should be paid to the defendant. The witness described it as one dealing between the parties, and that but for the latter consideration he did not believe that the bargain would have been made. It was therefore objected, that the proof varied from the declaration as laid, and showed rather a contract for the exchange of horses, paying the difference only in money, than an entire money payment for the horse in question. But the Court overruled the objection, Lord Ellenborough, C. J., observing that the parties agreed to consider the brother's horse as fourteen guineas in their mode of reckoning the payment for the defendant's horse, but still the consideration for the latter was money payment, and the defendant received thirty guineas in money and value.

(b) *Evidence.*

1. *PAYNE v. WHALE*. H. T. 1806. K. B. 3 Smith, 131; S. C. 7 East, 274.

A subsequent acknowledgment of the warranty is evidence.\*

In an action for money had and received, to recover back the price of a horse sold as a sound horse, and which proved to be unsound, it appeared in evidence that there had been a warranty of soundness at the time of the original contract of sale; but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said that, if the horse were unsound, he would take it back again, and return the money. It was contended, on the authority of *Power v. Wells*, Cowp. 818, and *Deston v. Downes*, Doug. 23, that the action for money had and received would not lie, because this was no other than a mode of trying the warranty, which could be by a special action on the case only; and of this opinion were the Court.

Lord Ellenborough, C. J., who delivered that opinion, observing, that the subsequent conversation was not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted on, but rather as a declaration that if the warranty were shown to be broken, he would do that which is usually done in such cases, take back the horse, and repay the money. Then where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action on the warranty.

2. *EAVES v. DIXON*. T. T. 1806. C. P. 2 Taunt. 343.

On an action on a warranty of a horse, the plaintiff must positively prove that the horse was unsound.

(c) *Damages, &c.*

*CASWELL v. COASE*. M. T. 1805. C. P. 1 Taunt. 566.

*Per Cur.* Upon the breach of the warranty of a horse, if the horse is returned, the measure of damages is the price paid for him; if the horse is not returned, the measure of damages is the difference between his real value and the price given. If the horse is not tendered to the defendant, the plaintiff can recover no damages for the expense of his keep.

**Waste.†**

I. **RELATIVE TO HOUSES**, p. 379.

II. **LAND**, p. 380.

\* A receipt for the price of a horse warranted sound is evidence of the warranty without an agreement stamp, because no stamp is necessary upon an agreement respecting the sale of personal property; 2 Campb. 407.

† Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him who has the remainder or reversion in fee simple or fee tail; Co. Lit. 53. Waste is either voluntary, which is a crime of commission, as by pulling down a house; or it is permissive, which is a matter of omission only, as by suffering it to

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The unsoundness must be clearly proved. The damages, if the chattel has been returned, are estimated by the price given; if not, the difference between that and its value.

## III. RELATIVE TO GARDENS, p. 380.

## IV. \_\_\_\_\_ WOODS, p. 380.

## V. \_\_\_\_\_ BY AND AGAINST WHOM SUSTAINABLE, p. 381.

## VI. \_\_\_\_\_ THE REMEDIES FOR.

(A) BY ACTION, p. 382.

(B) — WRIT.

(a) Process, p. 382. (b) Count, p. 383. (c) Pleas, p. 383. (d) Trial, p. 383. (e) Judgment, p. 383. (f) Inquiry, writ of, p. 384. (g) Damages and costs, p. 384.

## I. RELATIVE TO HOUSES.

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POOLE'S CASE. M. T. 1702. K. B. 1 Salk. 368.

Tenant for years made an under lease of a house in Holborn to J. S., who was by trade a soap-boiler. J. S., for the convenience of his trade, put up fat-coppers, tables, partitions, and paved the backside, &c.; and now upon a *feri facias* against J. S., which issued upon a judgment in debt, the sheriff took up all these things and left the house stripped, and in a ruinous condition so that the first lessee was liable to make it good, who thereupon brought a special action upon the case, against the sheriff and those that bought the goods for the damage done to the house.

Per Holt, C. J. During the term the soap-boiler might well remove the vats which he sets up in relation to trade, and that he might do by the common law, and not by virtue of any special custom in favour of trade, and to encourage industry; but after the term they become a gift in law to him in reversion, and are not removeable.

fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste; 4 Co. 64.

\* So, if he pull down a house demised, and rebuild it smaller than it was before, 2 Roll. 815. G. 33; or rebuild it larger, to the prejudice of the lessor, who may therefore be at greater charge in repairing it, 2 Roll. 815. l. 35; or, if he alter the house to the lessor's prejudice, as if he convert a parlour into a stable, per Vavasor, Keilw. 39; 2 Roll. 815. l. 31; or a corn mill to a fulling mill, 2 Cro. 182; or horse mill, even although it be for the lessor's advantage, 2 Cro. 182; or if he turn two rooms into one, R. Keilw. 38; 2 Roll. 815. l. 37; or convert a brewhouse of 120l. per annum into tenements of 200l. per annum, R. 1 Lev. 309. 311; 1 Mod. 94; 2 Saund. 252; or even if he build a new house where there was none before, Co. Lit. 53. a; Rey. 29; 2 Rol. 815; Ent. per Wood, Keilw. 38; De Cont. Hob. 234; or, having built it, suffers it to be decayed; 42 Edw. 3. 21. b; Co. Lit. 53. a.; in all these cases he is guilty of waste. So, if he pull down or remove any part of the house demised, as the windows, doors, wainscot, benches, furnaces, or other fixtures, Co. Lit. 53. a.; 4 Co. 63. b.; although fixed by the lessee himself with nails or screws; otherwise R. 4. Co. 64. a.; R. Moore, 177; Cont. per Dod. 1; Roll. 216. it is waste. But he may remove furnaces, coppers, or other utensils of trade, or marble chimney pieces, though fixed to the freehold, during the term; 1 Salk. 368; semb. 21 Hen. 3. a.; R. 20. 3. 13. b.

So, if the lessee, &c. suffer the house to be uncovered, whereby the timber decays, Co. Lit. 53. a.; although the timber be not thereby thrown down; 2 Rol. 815. l. 31; or if he suffer *statiuncula ante ostium* to be uncovered, whereby the timber thereof becomes rotten, 2 Roll. 814. l. 15; or suffer glass windows to be broken or carried away, Co. Lit. 53. a.; 4 Co. 63. b.; or if he permit the walls of a house to be decayed for want of plastering, whereby the timber is rotted, 2 Roll. 816. l. 50; the chambers of a house, 2 Roll. 816. l. 45; though the timber is not thereby rotted, 2 Roll. 817. l. 1; or if he do not scour a mote, &c., whereby the grounds, &c. are decayed, Div. 43; or if he suffer the house to be burnt by neglect or mischance, Co. Lit. 33. b.; 2 Roll. 820. l. 42; or if the house be uncovered by tempest, and it be suffered afterwards to remain in decay, Co. Lit. 53. a.; per 2 J. Moore, 62; 2 Roll. 2; Hol. 818. l. 2; in all these cases the tenant will be guilty of waste. And it will be waste, although there be no timber on the land demised for repairs; Co. Lit. 53. a. So, it will be waste if the walls be suffered to decay, though the timber was decayed before the commencement of the lease; 2 Roll. 817. E. 53. So, if the house were uncovered at the commencement of the lease, yet it will be waste if the tenant pull it down, Co. Lit. 53. a.; or if it were ruinous at the commencement of the lease, and he suffer it to be more so; 2 Roll. 818. l. 2. But if the house or walls were uncovered at the commencement of the lease it is no waste, if the lessee suffer them to decay without pulling them down, Co. Lit. 53. a.; or if the house were ruinous, and the lessee do not suffer it to be more so, but merely permits it to be as it was, it is not waste; Com. Dig. Waste, D. 2.

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An incoming tenant by ploughing up strawberry beds, tho' paid for on valuation, commits waste.

A lessee by cutting down timber commits waste;

## II. RELATIVE TO LAND.\*

### III. RELATIVE TO GARDENS.†

WATHERELL v. HAWELLS. 1818. N. P. 1 Campb. 227.

Per Lord Ellenborough, C. J. An action will lie against a tenant of garden ground for ploughing up strawberry beds, although it may be usual for the incoming tenant to pay the outgoing tenant an appraised value, and the tenant may have paid the former occupier accordingly.

### IV. RELATIVE TO WOODS.

MARTYN v. KNOWLEYS. H. T. 1799. K. B. 8 T. R. 145.

Case in the nature of waste. The declaration stated that the plaintiff was seised in his demesne of and in an undivided part of certain lands, &c., in

\* If the lessee, &c. suffer the sea, &c. to surround arable land, meadow, or pasture, it is waste, 2 Rol. 816. l. 40. if it happen by his default, Moor, 62. 73; but otherwise, if it be occasioned by the violence of a tempest. So, if he suffer a wall or bank against the sea or river, &c. to be ruinous, whereby the water surrounds a meadow, &c. and renders it useless, it is waste; Co. Lit. 534. b; Moor, 69. So, if he dig up the surface of the land, and carry it away, it is waste; R. 2 Rol. 816. l. 15. So, if he convert wood to arable land, or arable to wood, Co. Lit. 53. b.; Moor, 101; 2 Rol. 815. l. 4. 814. l. 50.; or pasture, 2 Rol. 814. l. 50; 1 Chit. Rep. 106. 116; or meadow to orchard or hop-garden, although it be thereby meliorated, 2 Leon, 134; or convert a hop-garden to tillage, Owen, 63; in all these cases the tenant is guilty of waste. But if pasture be converted to tillage for the improvement of the soil, 2 Rol. 814. l. 47.; or if the land were sometimes pasture and sometimes arable; Id.; or if it were stocked with conies, it not being a warren by charter or prescription, R. 2 Rol. 815. l. 15. 816. l. 15; and see Owen, 66; it is no waste. So, if the land lie fallow, whereby it becomes overrun with bushes, &c., this is not waste, although it be bad husbandry, 2 Rol. 814. l. 35. So, if trenches are dug in a meadow to draw off the water, it is not waste; R. 2 Rol. 820. l. 23; 2 Leon. 134. But if lessee for life or years opens mines in the land where there is no mention of mines in the lease, it is waste; Co. Lit. 53. b.; R. 5 Co. 12; R. 2 Mod. 193. So, if he dig for gravel, lime, clay, brick-earth, stone, &c., in pits not already open, it is waste; Co. Lit. 53. b.; Moore, 101. But it is not waste to dig for metal, coal, &c., in mines open at the time of the lease, Co. Lit. 53; B. R. v. Co. 12; or if the land were demised with all mines, R. v. Co. 12; nor is it waste for a parson, vicar, &c., to dig or open mines in his glebe; *semb.* 1 Sid. 152; Com. Dig. Waste, D. 4; and see Bac. Abr. Waste, C. 113.

† Waste may be committed in a garden or orchard; 2 Rol. 817. f. 33. As if the lessee cut down pear-trees, apple-trees, or other fruit-trees, Co. Lit. 53; 2 Rol. 817. l. 30; or if they be thrown down by tempest, and the lessor afterwards root them up, or cut down the germens growing, without planting new ones; 2 Roll. 887. l. 35. But if the lessee destroy the stock of a dove cot, warren, park, fish-pond, pool, &c., or suffer it to be diminished; Co. Lit. 53. A.; R. 4 Leon. 240; 2 Inst. 304; R. 2 Leon. 222; or throw down the pales of a park, or warren, Owen, 66; or stop up the holes of a dove cot, lb. or throw down the banks, &c. of a fish-pond, lake, &c. it is waste, Owen, 67; if however he merely destroys some doves, and yet if he leaves a sufficient stock remaining, it is no waste; 2 Leon. 322; Com. Dig. Waste, A. 3; and see Bac. Abr. Waste, c. 4.

‡ Hence oak, ash, and elm, are timber, after the age of 20 years, throughout the realm, Co. Lit. 53. a; Dy. 65. b.; 8 T. R. 145; and beech, willow, hornbeam, &c. where they are scarce, may be accounted timber by the custom of the country; Co. Lit. 53. a.; Moor, 812. So, if it be found by verdict that the tenant cut down black thorn *existent arbores majores*, it is waste, R. 2 Rol. 819. l. 52; Cro. Car. 531; or if he cut down white-thorn,



Wingfield, Berkshire, the whole of which was in the occupation of the defendant, who held and enjoyed the plaintiff's part as tenant, to him (the plaintiff); yet that he, the defendant, wrongfully ploughed up, &c., divers acres of meadows, &c., and wrongfully felled and destroyed divers timber and other trees, &c. The defendant pleaded the general issue. It appeared that the plaintiff and defendant were tenants in common of the land on which the trees grew; that the defendant occupied the whole, having a demise from the plaintiff of his moiety; and that he had felled many trees, all of which were of a proper age for being cut. [ 381 ]

Lord Kenyon, C. J., said that this verdict has neither principle nor authority for its support. The defendant cannot be in a worse situation by being tenant to the plaintiff of his moiety, than he would have been in if the plaintiff had not demised to him; and, considered in this point of law, this action cannot be supported. This is an action of *ex delicto*. If one tenant in common misuse that which he has in common with another, he is answerable to the other in an action, as for misfeasance; but here it does not appear that the defendant committed any thing like waste: no injury was done to the inheritances, no timber was improperly felled; the defendant only cut those trees that were fit to be cut; and, if he were liable in such an action as this, it would have the effect of enabling one tenant in common to prevent the others taking the fair profits of their estates; in another form of action, the plaintiff will be entitled to recover a moiety of the value of the trees that are to cut.

#### V. RELATIVE TO BY,\* AND AGAINST WHOM SUSTAINABLE.†

where it is in a large quantity, or made wood by the custom of the country, it is waste; 2 Rol. 813. c. 12; 2 Cro. 126; or if he destroy the germens of oaks, &c. it is waste; Co. Lit. 53. a. So, if a lessee do an act on which the timber trees decay, as if he lop and top them, it is waste; Dy. 65. a.; Co. Lit. 53. a. But it is not waste to cut down trees which are not timber, unless they are growing for shelter of the house; Co. Lit. 53. a.; and see Hob. 219. So it is not waste to cut down timber trees that are dead, *nec fructum, nec folia portantes*; Co. Lit. 53. a.; 2 Roll. 814. c. 17. And it will not be waste, however, if the trees be cut down for the repair of things useful, though not absolutely necessary, as for water troughs to be fixed in the ground for his cattle, 2 Rol. 823. c. 22; Com. Dig. Waste, E. 5; it is necessary also to mention that if the trees be excepted out of the demise, the tenant if he take them wrongfully is not punishable as for waste; 8 East, 13; see Bac. Abr. Waste, c. 2.

\* This action must be brought by him who has the immediate remainder or reversion in fee or in tail, Co. Lit. 53, a.; and whether he claim by purchase or descent is immaterial; 2 Roll. 825, l. 44. Therefore, if there be a lease for life or years, remainder to another life, reversion to another in fee or in tail, and the lessee commits waste, the reversioner cannot have a writ of waste during the continuance of the remainder-man's estate; Co. Lit. 54, b.; Al-leyn, 81; 2 Roll. Ab. 829; Cro. Jac. 688. But if the remainder-man die, or surrender his estate, the reversioner may then bring his action against the lessee; Moore, 387; 5 Co. 76; B. W. Jon. 51. Waste does not lie by tenant in tail after possibility of issue extinct; 2 Roll. 825, l. 31, even although the waste were committed before the death of the party whose issue was to have inherited; Moor. 18. Also the party who brings the action must have been seised of an estate of inheritance at the time of the waste committed; yet a surviving joint tenant may have a writ of waste for waste committed in the life-time of his companion, or a surviving parcener for waste in her sister's time; 2 Inst. 305; Com. Dig. Waste, C. 2; 3 Bac. Ab. Waste, G; 2 Saund. 252, a. n. 7.

† At common law waste lay against tenant in dower, tenant by the courtesy, 2 Inst. 145, 300; guardian in chivalry or socage, 2 Inst. 135, 405; F. N. R.

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## VI. RELATIVE TO THE REMEDIES FOR.\*

(A) BY ACTION.†

(B) BY WRIT.

(r) *Process.*‡

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(b) *Count.*§ (c) *Pleas.*||

59. F.; Co. Lit. 54; but not against lessee for life or years; 2 Inst. 299; 5 Co. 13, b.; Com. Dig. Waste, A. 2. By the statute of Gloucester, c. 5, however, lessees for life or years are punishable for waste, 2 Inst. 301; and this extends to a devisee for life or years, 2 Roll. 826, l. 25; and to a tenant from year to year, 2 Inst. 302; Co. Lit. 54, b. But a tenant at will in the strict sense of the term, is not punishable for permissive waste, Lit. & 71 Co. Lit. 57, a.; 5 Co. 13, b.; Cro. Eliz. 777, 784; 3 Lev. 359; nor can a writ of waste be brought against an executor for waste committed by his testator, it being a tort which dies with the person, 2 Inst. 302; 2 Roll. Abr. 828, l. 34; Com. Dig. Waste, C. 4; 5 Bac. Abr. Waste, H. F.; 1 Saund. 323, b.; 2 Saund. 252, a.

\* The remedy is, by this writ of waste, to recover the land wasted, and also treble damages, Stat. of Gloucester, sec. 5; and see Com. Dig. Waste, F. 2; Pleader, O. 22; or by action on the case to recover single damages.

† The writ of waste, however, is very seldom resorted to in practice; at present modern leases have usually a clause in them giving the lessor a power of entry in case the lessee commit waste or destruction, and the lessor may thereupon recover the premises in an ejectment; and the effect of the writ of waste, with respect to damages, is now obtained by the action on the case as above mentioned. But, although the writ of waste is now nearly obsolete, yet the action on the case lies in all cases where a writ of waste lies.

‡ The original in waste is a summons given by the statute of Westminster 2, c. 14, instead of the prohibition at common law, 2 Inst. 389; see the form, F. N. B. 55, C. If brought against tenant by the courtesy, F. N. B. 53, C.; or tenant for life or years, F. N. B. 55, C.; Lutw. 1548; it recites the statute; but if it be brought against tenant in dower or guardian, it does not; F. N. B. 55, C.; Lutw. 1548. If the defendant do not appear at the return of the writ, an attachment is sued out, and if he still do not appear, then a *distringas* issues; and if he do not appear at the return of the *distringas*, a writ of inquiry then issues to the sheriff in pursuance of the statute of Westminster 2, c. 14, directing him to summon a jury, and go to the place wasted and inquire of the waste and damages, and the plaintiff shall have judgment *pro loco vastato*, and damages accordingly; Com. Dig. Pleader, 3, O. 1; 1 Bac. Abr. Waste, K. The defendant is entitled to an *essoign*, and if he do not cast it at the return of the writ, he may have it at the return of the attachment.

§ The declaration must state the plaintiff's title to the inheritance; Hob. 84. If the plaintiff count upon a demise by himself he must allege his seisin in fee or in tail, and a demise to the defendant, Yelv. 140; or if upon a lease made by his ancestor, &c. he must allege the seisin of the lessor, the lease, &c. and his own derivative title; Co. Ent. 308, B.; 2 Saund. 235; Com. Dig. Pleader, 3, O. 2. The declaration then states the waste, and in doing so, it must particularly specify the quality and quantity of waste done; Com. Dig. Pleader, 3, O. 5; although if the plaintiff prove any part of the waste laid, it will be sufficient; 2 Saund. 236. It concludes by stating the waste to be the disinheriting of the plaintiff; Co. Lit. 285, a.; or if the action be by husband and wife, then to the disinheriting of the wife; 2 Rol. 831, l. 15, 20; Com. Dig. 3, O. 6; see the form of the declaration, 2 Saund. 234. It must charge the defendant as lessee, assignee, devisee, executor, or administrator, and for such waste as had been committed by him respectively; Co. Ent. 692, 693, 695, 700, b.; 2 Rol. Abr. 831, Pl.; 2 Hut. 110; 2 Saund. 234.

|| The defendant may plead in abatement to the plaintiff's title; as if the plaintiff entitle himself to a reversion in fee by descent the defendant may plead a devise to the plaintiff in tail, Lutw. 1557, 1558; or he may plead that the plaintiff had nothing in the reversion, Yelv. 141; but then he must show how the reversion was divested, for rien in fee reversion generally will be bad, Co. Lit. 356; unless the action be brought by a grantee

- (d) Trial.\* (e) Judgment.†  
(f) Inquiry, writ of.‡  
(g) Damages and costs.§

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**Watercourse and Rivers.**

1. HEALY V. SHAW. M. T. 1807. K. B. 6 East, 214. S. P. BULSTON V. BAMSTEAD. 1808. N. P. 1 Campb. 463.

Water run through the land of A., and then through the contiguous close of B.; and A. has for the space of twenty years used a portion of the stream for particular purposes. Such enjoyment was held to be *prima facie* evidence of a legal title in A. so to appropriate that portion of the water.

2. BULSTON V. BAMSTEAD. 1808. N. P. 1 Campb. 463.

A plaintiff had enjoyed a spring and stream of water issuing out of his own grounds for twenty years, and the defendant, by opening a quarry in his own adjoining land, intercepted the spring. It was held to be no answer to the action that a grant could not be presumed, inasmuch as the existence of the watercourse through the defendant's land had been but recently discovered; and Lord Ellenborough held that the enjoyment for twenty years afforded conclusive evidence of right. If, however, such a right really depended upon the presumption of a grant, the evidence of twenty years' enjoyment could scarcely be considered to be conclusive.

Twenty years' exclusive enjoyment of a run of water raises a presumption of the plaintiff's right;||

Subject, however to be rebutted or explained away.

of the reversion; Id. So, if the plaintiff's title fail *pendente lite*, the defendant may plead it *pais darien* continuance, as if his reversion fail, Yelv. 141; or he became tenant in tail after possibility of issue extinct; 1 Roll. 106; Com. Dig. Pleader. 3. O. 10. In bar, he may plead the general issue *nul waste fait*, 2 Saund. 238; Co. Ent. 700. 708; which puts the whole declaration in issue, Lutw. 1547; and under this may be given in evidence destruction by tempest, lightning, enemies, &c. or any other matter which proves not that the waste was justifiable or excusable, but that nothing which the law terms waste was committed; Gilb. Ev. 270. 272; Com. Dig. Pleader. 3. O. 7; 2 Saund. 238; Bac. Abr. Waste, E. The writ of waste does not seem to be limited by any statute, for the stat. 32 Hen. 8. c. 2. does not extend to it; Bro. Stat. Lim. 20, 21; Com. Dig. Temp. G. 10. In bar, also, he may plead, specially, a release from the plaintiff, or one of the plaintiffs; accord and satisfaction that he took the timber for repairs, or for fuel, cartbote, &c. or that the trees were *aridæ mortuæ nec fructum nec folia portantes*. So, he may plead that his lease is without impeachment of waste, or that he purchased the trees or the like. So he may plead in excuse that he repaired before action brought, Id. 3. O. 15; or that the premises were so ruinous at the commencement of the lease that they could not be repaired; Id. 3. O. 17. So, he may plead that there is a *mesne remainderman* alive, Id. 3. O. 19; and that no demise was made to him, or that he assigned, and *nul waste fait* before the assignment; Id. 3. O. 18; 2 Saund. 238; Bac. Ab. Waste.

\* The jury process is by *venire* and *habeas corpora juratores*, as in ordinary cases; Cro. Car. 381. The jury should regularly have a view of the premises, otherwise it seems they may find a verdict for the defendant; 1 Leon. 267; Noy, 5; Com. Dig. Pleader, 3. O. 21; 1 Arch. P. B. R. 159. The proceedings to the trial inclusive are the same as in ordinary cases.

† If the judgment be against the defendant in the tenet, it is *pro loco vastato*, and for treble damages; if against him in the tenet, then for damages only; see Stat. of Gloucester. c. 5; Com. Dig. Pleader, 3. O. 22. Judgment for the defendant is the same as in ordinary cases, as the writ of waste cannot be brought for any injury where the damage does not amount to 40*d.*; Co. Lit. 54. A.; Com. Dig. Pleader; some say 40*s.*; Winch, 5; 2 Rol. 824. l. 10. 15. 25. Therefore where the jury gave three farthings damages, the Court allowed judgment to be entered for the defendant.

‡ If the defendant suffer judgment by default, or confess the action, a writ shall go to inquire of the damages only; R. Cro. Eliz. 18; Hut. 44; Com. Dig. Pleader, 31. O. 1. 22; Bac. Abr. Waste, M.

§ If the single damages given be under 20 nobles, the plaintiff, if he obtain judgment after plea pleaded, or demurrer joined, shall likewise recover costs; and if the plaintiff be nonsuited, or discontinue, or a verdict be found against him, the defendant shall be entitled to costs; 8 & 9 W. 3. c. 14. sec. 3.

|| When a mill has been erected on a stream for a long period of time, the owner has a right that the water shall continue to flow from his mill over the land of another in the same manner that it has done during all that time. And it is no defence that the owner has within the last twenty years substituted a new wheel, which requires less water than the old one.

A prescriptive right to a watercourse to work a mill is not destroyed by the erection of a new one.

[ 385 ]  
Case lies for diverting a watercourse.\*

PALMER v. KEBBLEWHAITE. T. T. 1664. K. B. 2 Show. 250.

Case for diverting a watercourse. The jury found a special verdict, that a man had an ancient watercourse through his lands to an old mill, and he pulled that down and built a new mill; and a stranger abated a dam which guided the stream, the dam standing on this stranger's grounds, and guiding the water to the defendant's and plaintiff's ground both; since the erection of the new mill did not destroy the right; it was held for the plaintiff.

4. RICHARDS v. HILL. E. T. 1695. K. B. 5 Mod. 206.

Action on the case for diverting a watercourse, in which the plaintiff declared that he was seised of a water mill to him and his *secundum consuetudinem deconatus de* Wolverhampton, and so prescribed for a watercourse, &c.; and that the defendant intending to deprive him of the profit of the said mill, did divert the water *ab antiquo cursu suo, per quod* he could not *molare* so fast. There was a verdict for the plaintiff, which the Court would not disturb.

5. JEBB v. POVEY. 1798, N. P. 1 Esp. 379.

Issue was joined on a traverse that a stream of water has from time immemorial had been accustomed to flow in a specified course.

Lord Kenyon, C. J. held that one who claims a right of water, which depends upon the prescription alleged, was incompetent as a witness, upon the same principle that a commoner cannot by his evidence support a custom beneficial to himself; out it is otherwise where a right of water is claimed by prescription, as appurtenant to a particular messuage.

6. WRIGHT v. HUNT. E. T. 1817. K. B. 2 B. & A. 662.

In this case the Court held, that the public rights on a navigable river are not determined by an obstruction for twenty years; they can only be barred by an act of parliament.

A party claiming an easement, arising out of the watercourse, is incompetent as a witness.

But twenty

years ad

verse use of

a public

river does

not bar the

public

right.

\* Case for maliciously throwing down a dam, by which defendant diverted a great part of water that *curre consuevit et debuit* to his mill, without alleging a prescription to the water, or that the mill was an ancient mill, is good; Palmer v. Kebblewhaite, 1 Show. 64; 2 Saund. 114; Skin. 65. If it be alleged to be an ancient mill, it must be proved; 2 Saund. 114; Kebblewhaite v. Palmer, Carth. 84. An action for disturbing a watercourse, with a *curre debuit* only, without saying, *solebat* is good; Jackson v. Salway, 1 Show. 250; Comb. 942, for being against a wrong-doer, possession is sufficient; Palmer v. Kebblewhaite; 2 Show. 243. 249; 1 Saund. 113. b. A declaration for diverting a watercourse without *curre debuit et debet* held well; Packman v. Trip, Comb. 231; Palm. 290. Duncombe's case; Heb. 34. And such a declaration was holden good after verdict, though it stated no *terminus a quo* of the stream, nor that it is used to run, &c.; for they must be intended to have been proved; Skin. 389. 316. An action for diverting a watercourse; running in, by, and across the land, &c. must state for what purposes the water was used, 2 Show. 503. In an action on the case for stopping water running to the plaintiff's mill, with a *continuando*, a plea that the stopping was *contra voluntatem*, and on such a day, which was between the first and the last day laid in the *continuando*, the plaintiff himself had abated the nuisance, is not good in bar of the action; for in an action on the case the plaintiff is still entitled to the damages that accrued before the nuisance was abated; Kendrick v. Baitland, 2 Mod. 253. An information lies for cutting down the banks of a public river, and thereby diverting the course of the water, although that part of it is by act of parliament vested in private persons, and an action given them for damages done to it; Rex v. Stanton, 2 Show. 30.

† On a question, whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river; Mills v. Rose, 1 Mars. 313; 5 Taunt. 704. Where a river is not navigable, the presumption is that the soil is the property of the owners on each side to the middle of the river; but in the case of a navigable river, the presumption is that the soil is vested in the crown. Rex v. Smith, Doug. 441. A navigable river is the king's highway for the use of himself and his subjects; Loft. 556. That the right to the use of the water of rivers as an easement to lands contiguous to rivers is a right of occupancy. The first settler may use as much as he pleases; but, having taken a certain quantity by a channel of a certain dimension, and another person having settled lower down the stream, and taken the use of the water subject to the then definite use of the water by the first settler, the latter is entitled to enjoy as much as he can occupy in a similar definite manner; and, though the prior settler might have previously used all the water, he cannot then abridge the use of the second settler and occupant; Beale v. Shaw, 2 Smith, 321; 6 East, 208. A right to drown a neighbour's land during arbitrary periods, is

7. *BALL v. HERBERT*. E. T. 1789. K. B. 3 T. R. 253.

It was resolved by the Court that the public are entitled at common law to tow on the banks of ancient navigable rivers.

The right must be founded either on statute or usage.

[ 386 ]  
The public have no right with out special custom to tow upon the banks of ancient navigable rivers.

*Way*\* See *anle*, tit. *Highway*.

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## II. RIGHT OF.

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OF, p. 391.

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## I. RELATIVE TO THE DIFFERENT KINDS OF.

AUSTIN'S CASE. M. T. 1661. K. B. Vent. 189.

Per Hale, C. J. If a way leads to a market, and is a common way for all travellers, and communicates with a great road, it is a highway; but if it leads only to a church, a private house, or village, or to fields, it is a private way. But this is matter of fact, and much depends on reputation.

[ 387 ]  
The kind of way depends on whether it leads to a public or private destination.†

## II. RELATIVE TO THE RIGHT OF.

(A) BY CUSTOM.‡

(B) BY GRANT.

1. *HOLME v. SELLER*. T. T. 1668. K. B. 3 Lev. 305.

Debt upon an obligation of 20*l.*, conditioned for the performance of articles, whereby the defendant granted and agreed with the plaintiff, and his heirs and assigns, that it should be lawful for them at all times afterwards to have and use a way by and through a close of the defendant; in consideration whereof the plaintiff granted and agreed to pay the defendant 20*l.* at the signing of the articles, and 6*d.* per annum to him, his heirs and assigns, and also to repair the gate between the closes of the plaintiff and defendant; and the debt was not restricted to the measure of the accustomed exercise thereof: *Alder v. Saville*, 5 Taunt. 454. Case against a corporation for not repairing a creek, in which the tide of the sea ebbed and flowed (but not saying that the creek was a navigable river, as from time immemorial they had been used, is well enough without laying the obligation to be *ratione cense*, or for other special case, and without laying special damage; the Mayor of Lynn *v. Turner*, Cowp. 86. A verdict for the defendant in a former action for diverting water from his mill is evidence, but not conclusive for the defendant in a second action; *Voght v. Winch*, 2 B. & A. 662. So, a verdict for the plaintiff in an action for obstructing his barges in a navigable river is strong, but not conclusive evidence in an action for a similar obstruction; *Mills v. Rose*, 5 Taunt. 705.

\* A way is either public or private—the former was considered under tit. Highway, and the latter is now the subject of the present title. A private way is a right which one or more persons have of going over the land of another. This may be claimed either by grant, prescription, custom, by express reservation as necessarily incident to a grant of land, or by virtue of an enclosure act.

† There are four kinds of ways: 1. A foot way. 2. A horse way, which includes a foot way. 3. A carriage way, which includes both horse way and foot way. 4. A drift way. Although a carriage way comprehends a horse way, yet it does not necessarily include a drift way; it is said, however, that evidence of a carriage way is strong presumptive evidence of the grant of a drift way.

‡ A custom that every inhabitant of such a vill shall have a way over such land, either to church or to market, is good, because it is but an easement, and not a profit. A tithe owner is entitled to make use of the road ordinarily used for the ordinary occupation of the close in which the tithe is taken, but he cannot justify carrying his tithe home by any other road, although the farmer himself may have used it for the occupation of his farm.

defendant covenants that John Seller, his son when he attained the age of twenty-one years, should confirm it.

Under a grant to make a free and convenient way, such road may be used as is necessary. 388

It was resolved by Pollexfen and Rokesby only in court, that it was a good grant of the way.

2. *SENHOUSE v. CHRISTIAN*. M. T. 1787. K. B. 1 T. R. 560.

Under the grant of a free and convenient way, through, and over a slip of land leading from A. to B., with liberty to make and lay causeways, &c., and to use the same with carriages to carry coals, &c.; the grantee has a right to make any such way as is necessary for the carrying that commodity.

3. *READ v. BROOKMAN*. E. T. 1789. K. B. 3 T. R. 151. Abridged ante, tit. Profert.

Per Lord Kenyon, C. J. In pleading a right of way by grant *profert* of the deed shall be made; if lost, it should be so averred.

4. *GERRARD v. COOKE*. E. T. 1802. C. P. 2 N. R. 109.

A. granted to B. his heirs and assigns, occupiers of certain houses abutting on a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage way, and gave him all other powers, &c., incident or necessary to the enjoyment of the way. It was holden that, under the terms of this grant, the grantee was entitled to put down a flag stone upon the piece of land in front of a door opened by him out of his house into this land, *Chambre, J.* observing that the nature of the thing was material; in considering the effect of the words, the way was granted for the occupation of a dwelling-house, and the grantee ought to have every thing needful for the occupation of his dwelling-house; he ought, therefore, to have the opportunity of repairing the way in such a manner that it should not be wet or dirty when he or his family, or his visitors, entered. If any inconvenience had been occasioned to the grantor it might make a difference, but that was not the case here, nor was it to be feared that any right hereafter could be set up in respect of the soil in consequence of this stone having been put down, for the precise extent of the road was pointed out.

#### (C) OF NECESSITY.

1. *HOWTON v. FREARSON*. M. T. 1798. K. B. 1 T. R. 50.

Where one as a trustee conveyed land to another, to which there is no access but over the trustee's lane, a right of way passes of necessity, as incidental to the grant, if the owner of two closes having no way to one of them but over the other with the latter, without reserving the way. Lord Kenyon, C. J. entertaining great doubt upon the general question, desired that the case might be argued again; when he said: Upon further consideration I find it impossible to distinguish this from the general case where a man grants a close surrounded by his own land (in which case the grantee has a way to it of necessity over the land of the grantor) merely on the ground that the plaintiff conveyed to the defendant in the character of a trustee, for it cannot be intended that he meant to make a void grant. There being no other way to the defendant's close but over the land of one of the persons who granted to him, he was entitled to such a way of necessity, upon the authority of all the cases, upon the principle that every deed must be taken more strongly against the grantor.

When they made the conveyance it must be taken for granted that they

\* Under the grant of a way from A. to B., in, through, and along a particular way, the grantee is not justified in making a transverse road across the same. If a person has a way through a close, in a particular direction, and afterwards purchases other closes adjoining he cannot extend the way to those closes.

† A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although each land, together with the land over which the way is, both belonging to the grantee of the way.

‡ If a person having a close, bounded on every side by his own lands, grants the close to another, the grantee shall have a way to the close as incident to the grant, or, as it is sometimes termed, a way of necessity, for otherwise he cannot derive any benefit from

intended to confer some beneficial interest, but he can derive no benefit whatever from the grant unless he has a right of way to the land; even upon the general ground, I was prepared to submit to the express authority of the case in *Lutw. 1487*, though I cannot say that my reason has been convinced by it. There are, I think, great difficulties in the question; but in the other mode of considering the case those difficulties are got rid of altogether, and it falls within all the authorities, which are not controverted even by the plaintiff.

2. *REYNOLDS v. EDWARDS*. M. T. 1791. K. B. Willès, 282.

A., the owner of a close situate within a close belonging to B., had a prescriptive right of way through B.'s close to his own. Twenty-four years before the action brought B. had stopped up this way, and made a new way, which has been used ever since, but latterly B. stopped up the new way. In an action brought by B. against A., for going over the new way, it was held that A. could not justify using this way as a way of necessity; but that he should either have gone the old way and thrown down the enclosures, or brought an action against B. for stopping up the old way. The new way was only a way by sufferance during the pleasure of both parties, and A. by stopping it up determined his pleasure.

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But where there is a way of necessity and then a new one made which is subsequently stopped up, the old one should be used.

3. *BUCKBY v. COLES*. H. T. 1806. C. P. 5 Taunt. 311.

If a person purchases close A., with a way of necessity thereto over close B., a stranger's land, and afterwards purchases close B., and then purchases close C., adjoining to close A., and through which he may enter close B., and then sells close B. without reservation of any way, and then sells close A. and C.; the purchaser of close A. shall nevertheless have the ancient way of necessity to close A. over close B.

Unity of possession and subsequent severance do not destroy a way of necessity.

(D) BY PRESCRIPTION.\*

*SCILLY v. DALLY*. E. T. 1697. K. B. Salk. 562.

Per Holt, C. J. The reason why the commencement of particular estates must be showed in pleading is, because they are created by agreement out of the primitive estate; and the Court must judge whether the primitive estate and agreement be sufficient to produce the particular estate claimed.

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In pleading a right of way by prescription by a tenant, the plea must show the seisin in fee of the ancestor.

### III. RELATIVE TO PLEA OF RIGHT OF.†

the grant; but this kind of way cannot be pleaded generally without showing the manner in which the land over which the way is claimed is charged with it. The grantee of lands shall have all the ways, easements, &c. which the grantor had; and, therefore, by the grant of a house, to which there is a way by necessity, the grantee shall have the way, although it be not expressed in the grant; 6 Mod. 4. A way of necessity is, in fact, a way by grant; 1 Saund. 323. a. Though a man may sometimes have a way by provision of law, it ought plainly to appear that it is of absolute necessity; *Lutw. 521*. The grantee of wreck has, of necessity, a right of way to it over the land of another; *Anon. 6 Mod. 149*. Persons using navigable rivers may, by custom, have a right of way on their banks; *Rex v. Ainsworth, 6 Mod. 163*. Towing on the banks of navigable rivers is justifiable of common right; *Young v. —, 1 Ld. Raym. 725*.

\* A private way may also be claimed by prescription that defendant is seised in fee of a certain messuage, and that he and all those whose estate he has in the said messuage have from time immemorial had a foot way, &c. (as the case may be) from — to —, created by agreement out of the primitive estate, and the Court must judge whether the primitive estate and agreement be sufficient to produce the particular estate claimed, and this is a fundamental rule which ought not to be broken upon fancied inconveniences. Unity of possession of the land to which a land is appurtenant by prescription, and of the land over which the way is, will extinguish the way; for the prescription is gone, and the way is against common right. As from an adverse enjoyment of a way for twenty years or upwards a right by grant may be presumed; it is, in many cases, advisable, to claim the way under an unexisting grant as well as by prescription, lest proof of unity of possession at some distant point of time should destroy the title by prescription.

† In pleading a right of way, the particular nature of it ought to be shown, as that it is a footway, carriage-way, &c. and the *terminus* and course of a private one must be stated, but it is sufficient, if it be a public highway, to allege that it is a common highway, without showing how it became so, or that it has been appropriated to the public use time immemorial. To trespass a plea that there was a highway from such a place to such a place, that the plaintiff stopped the same, so that the defendant could not pass, and therefore that he went over the plaintiff's close, is good; *Anson v. French, 2 Show. 28*. If a man pre-

[ 391 ] IV. RELATIVE TO REPLICATION TO PLEA OF RIGHT OF.\*

V. RELATIVE TO THE DISTURBANCE OF THE RIGHT OF.

TANT V. GOLDBERN. M. T. 1703. K. B. 2 Ld. Raym. 1093.

*Per Cur.* If indeed a builder of a house sells the house with the lights and appurtenances, he cannot build upon the remainder of the ground so near as to stop the lights of the house.

To stop up a way with out show ing title is actionable†

**Weights and Measures.‡**

scribe for a way, he must show in what vill the place is which is the *terminus ad quem* of the way; Lutw. 647. To an action for a right of way claimed by necessity, the defendant may show that the plaintiff has another way convenient to that which he claims, but such a plea cannot be pleaded where the way is claimed by grant or prescription; *Staple v. Heydon*, 6 Mod. 4: If a man prescribe for a way to B., he cannot justify going farther; Lutw. 44. If A. has a way over B.'s ground to a close called Blackacre, A. cannot justify driving his beasts over this way to Blackacre, and so on to another close lying beyond it; *Howell v. King*, 1 Mod. 191. If trespass be brought for using a way against one who has enjoyed it for twenty years, which of itself raises a presumption of a grant, he should justify under a non-existing grant; 2 Saund. 175. a. Prescription for a right of way for A. and others, not naming them, is uncertain and bad, even after verdict. *Willes*, 72: If an ancient footway is stopped, and a new way set out, it is no trespass to go in the new; *Horn v. Widlake*, *Yelv.* 141; 8 E. 4, 5. a. 1; *Brownl.* 212; *Roy.* 128. As where the owner of a close situate within a close belonging to B. had a prescriptive right of way through B.'s to his own; twenty-four years ago B. stopped up the old way and made a new, which was used ever since until lately, when B. stopped it up; in an action brought by B. against A. for going over the new way, it was holden that A. should either have gone the old way and thrown down the inclosure, or brought an action against B. for stopping up the old way; *Reynolds v. Edwards*, *Willes*; 282.

The plaintiff in his replication may either deny the right of way; or, if a private way be pleaded by the defendant, controvert the validity of his title, and under such replication he may give in evidence an order of justices, or an inclosure act, and award thereon, whereby the public or private way has been stopped, but when the plaintiff cannot negative the existence of the right, but proceeds for a different trespass, he should not traverse the plea, but resort to a new assignment.

† If a man have a right of way over another's land, and be disturbed in the enjoyment of it, either by the tenant of the land, as by working it, ploughing across it, or otherwise apportioning it, or by a stranger; the general remedy is by action on the case against the party who has caused the obstruction. Case or assize lies for stopping a way to a person's freehold; *Cro. Eliz.* 466. 845. Case lies for stopping up a common passage, if plaintiff can show any special damage from it. But an action will not lie by an individual for an obstruction in a public highway, unless he sustain a particular damage; but if the plaintiff state that the defendant obstructed, &c. by a ditch and gate across the road, by which the plaintiff was obliged to go a longer and a more difficult way, and that the defendant opposed him in attempting to remove the nuisance, this is a sufficient damage to support the action; *Willes*, 73. A declaration for disturbance in a right of way held good, without prescription alleged; *Winford v. Wollaston*, 3 Lev. 266. In an action for disturbance of a way, the plaintiff should declare that he was possessed of a certain messuage, by reason whereof he had, &c. a way; 2 Saund. 104. A count in an action on the case for a disturbance in a way adjudged ill after verdict, because it was claimed *ad quendam pectam terræ per estimat.* four acres; *Jones v. Hammond*, Lutw. 48, 49.

‡ By the 5 Geo. 4. c. 74. which act by the 6 Geo. 4. c. 12. commenced on the 1st of January, 1826, an attempt is made to introduce an uniformity of weights and measures throughout the United Kingdom. By this statute an imperial standard yard, pound, gallon, and bushel are fixed and the principle laid down on which they may be renewed if lost or destroyed. Models and copies of these and their parts and multiples are to be deposited at the Chamberlain's Office, Westminster, and sent to London, Edinburgh, Dublin, and other cities and places. The magistrates are to procure them for the use of their respective counties, and all contracts are to be governed by these standards, unless express agreement to the contrary; and if it be under the proportion of the local or special measure to the standard specified in the agreement, such agreement is null and void. The changes introduced by the act in the standard of capacity are very great: by it the old wine gallon of 231 cubic inches, the beer and ale gallon of 282 inches, the old corn gallon of 2,688, the old Scots pint or Stirling jug, with all other local measures of every description are completely abolished; the capacity of the imperial standard measure gallon is 274 cubic inches; and the proportion it bears to the old wine gallon is nearly as 6 to 5; to the ale gallon, as 59 to 60; to the corn gallon, as 33 to 32; to the Sterling pint, as 52 to 22; the equivalent rate of duties according to the imperial measure was regulated by 6 Geo. 4. c. 58. In debt for an amercement in a court leet for obstructing the jury in examining weights, it should be



**Writs.** See *ante*, tit. *Fish and Fisheries*, vol. ix. p. 678.

[ 392 ]

**Whale Fishery.\***

LACON V. HOOPER. E. T. 1795. K. B. 6 T. R. 224.

This was an action on the case against the defendants, commissioners of the customs, for not making an order on the receiver general of the customs, to pay the plaintiffs a premium of 700*l.*, to which the plaintiffs claimed to be entitled under the stat. 23 Geo. 3. c. 20. At the trial before Lord Kenyon, a verdict was given for the plaintiffs with nominal damages, subject to the opinion of this Court on an objection then taken, that the plaintiffs were not entitled to the premium, because their ship had not been at sea during the full time of fourteen calendar months, as required by the stat. 28 Geo. 3. A rule having been accordingly obtained, calling on the plaintiffs to show cause why the verdict should not be set aside and a nonsuit entered, it now came on to be argued. The facts of this case were shortly these. The plaintiffs' ship cleared out of the port at Yarmouth 29th October, 1789; on the 10th of Nov. she sailed; Sept. 27, 1790, she returned to Corton bay, on the Suffolk coast, where there is no port; and on the 29th of December, 1793, she arrived at Yarmouth. It was admitted that this ship had complied with all the other conditions imposed by the act, and it was in all other respects entitled to the premium of 700*l.* Two questions were made; 1st. Whether the fourteen months were to be computed from the time of clearing out, or only from the time of sailing. If the former, the plaintiffs' ship had been about fourteen months; secondly, if the latter, then whether the act meant lunar or calendar months; if lunar, at all events she had been out the full time.

Per Lord Kenyon, C. J. Two questions have arisen in the argument in this case; the last of which I will first dispose of, because it is of great importance that that point which has been so long settled should not now be shaken. I confess I wish that, when the rule was first established, that it had been decided that "months" should be understood not to mean calendar, but lunar months; but the contrary has been determined so long and so frequently that it ought not again to be brought in question; in the instance indeed of a *quære impedit*, the computation of time is by calendar months, but that depends on the words of an act of parliament *tempus semestre*, but for all other purposes and in all acts of parliament where months are spoken of without the word "calendar" and nothing is added from which a clear inference can be drawn that the legislature intended calendar months, it is understood to mean lunar months. Now I can see nothing in this act of parliament to warrant us in departing from the general rule, the months of January, December, &c. are mentioned for purposes only as the periods within which the ships were to sail and return, but not as the duration of the time that the voyage was to be continued, and there is nothing in any part of the act from which it can be inferred that the legislature in speaking of the number of the months that the ships were to be at sea, meant calendar months. On the other question I am also of opinion with the plaintiffs; the words "clearing out" are perfectly well understood in the commercial world, where the parties have obtained all their documents that they were not examined before; *Moore v. Wicket*, Andr. 48. It should also be shown that the attempt to enter a ship to examine the weights was made at a reasonable time. In the declaration in the above case, the obstruction was alleged to have been made on the 1st of December, and the present appearing to be of an obstruction made on the 9th of May, it was held ill, the facts being different; *S. C.* Andr. 50. If a man bargain and sell so many acres of wood, it shall be measured according to the use of the county; *Finch's case*, 6 Co. 67. a.

\* The general law upon this subject has been collected under tit. *Fish and Fisheries*. The statutes regulating this branch of commerce are extremely numerous, and are collected and very perspicuously arranged in the 1st vol. of Mr. Chitty's *Com. Law*, p. 361. It may however be useful to observe in this place, that the general customs of these fisheries are binding upon the parties frequenting them; *Fenning v. Lord Grenville*, 1 Taunt. 242. abridged *ante*, vol. 9. p. 673. According to these regulations the striker of a whale's right only continues whilst (but then exclusively) he retains dominion, *Littledale v. Scarth*, 1 Taunt. 243; and the striker with a droug is entitled to share a moiety with the killer; *Id.*

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ments from the Custom-house to enable them to sail, when they can neither take other goods nor men on board, and when it is therefore their interest to sail as soon as possible. The legislature supposed they would sail, particular circumstances may sometimes retard the sailing, but it is not probable that a ship will remain long in port after she has been cleared out, and the only words in the last act are "fitted and cleared out." In the recital of the former act, in the last, both terms are used, "clearing out, and sail;" but in the enacting part, where the legislature professed to amend the former act, they omitted the latter word "sail," and used the former only as the time from which the computation was to be made, in this part of the act they seem cautiously to have changed the phrase used in the former act. On both points, therefore, I think that the plaintiffs are entitled to recover.

### Wharf and Wharfinger.\*

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1. CASE OF LINDERS WHARF. H. L. 1766. K. B. 1 Bl. Rep. 581.  
*Per Cur.* We are all of opinion that the commission is not well founded, the designation of ports is part of the king's prerogative. He might make regulations therein by common law, in order to secure his revenue, yet without an act of parliament he could not impose new duties to prevent frauds upon the revenue. The stat. 4 Hen. 4. c. 20. was made; but this being found inadequate produced the 1 Eliz. c. 11. which restrains the assignments of wharfs and quays to open places only. This was followed by 14 Car. 2. c. 11. which gives further powers, but expressly prohibits all lading or unlading except upon open places. The power of the crown to issue this commission depends entirely upon these statutes, and we think that power not well pursued. Not one of these words, "open place, quay, or wharf" is used in this

\* A wharf is a convenient place for the landing, warehousing, and shipping of goods. Natural ground on the banks of a canal though used for the purpose of a wharf, is not a wharf, neither is the sea beach; *Rex v. Regent's Canal Company*. The term in its ordinary and legal import means a place built or constructed for the purpose of loading and unloading goods; and for use of which wharfage or compensation is paid to the owner. Sufferance wharfs are certain privileged places on which goods are permitted to be landed in the custody of the Custom house, till such time as the duties are paid or the goods bonded. Of a wharfinger reasonable and common care of any commodity entrusted to his charge is exacted; *Peake*, 114; he is not like an inn-keeper and carrier, bound by any custom of the realm, nor to be considered as an insurer, unless he also unite the character of a carrier, 1 *Stark*. 172; he stands therefore in general in the situation of an ordinary bailee for hire, and is therefore answerable only for ordinary neglect; see ante, tit. Bailment. He is not answerable for a theft committed by his servants if he can prove that the goods were lodged in a place of security, and that he has not been guilty of positive negligence nor exercised less care towards them than towards his own property. He is not answerable for destruction by rats, reasonable care having been taken to prevent such mischief, *Peake*, 119; nor is he liable for loss arising from robbery, accident, or fire, unless arising from his gross default or negligence; 4 *T. R.* 581; 2 *Stark*. 400. In cases where the wharfinger had insured the property from fire, and if it be burnt, and the warehouseman receive the amount of the insurance the owner may recover from him. The responsibility of a wharfinger commences directly the goods are delivered into his custody. The responsibility of the warehouseman commences from the moment that his tackle is applied to the goods for the purpose of lifting them into the warehouse, and it is no excuse for the injury done in raising them from the cart or other vehicle that the owner's agent or carman refused to secure them in the manner which the warehouseman pointed out; 4 *Exp.* 262. The responsibility ceases when the goods are delivered by the wharfinger out of his possession according to the owner's express or implied directions. Where it is the custom of wharfingers, when goods are sent to be forwarded coastwise, to deliver them to the mates of the coasters, and not to ship the goods themselves, or make any charge for shipping, the responsibility of the wharfinger ceases with the delivery to mate, though the goods are lost before they are carried off the wharf; 4 *Exp.* 41. Wharfage seems only to be due when the goods are laid upon the wharf for the purpose of being loaded or unloaded; it differs from anchorage or mooring, which are charges incidental to the ship. In London the duty for wharfage and cranes is created by Stat. 22 Car. 2. c. 11. which directs that the amount thereof shall be regulated from time to time by the king in council, 3 *Barr.* 1409. A wharfinger having only the mere custody of goods cannot by an unauthorised sale affect his employer; 15 *East*, 42; and vide ante, tit. Principal and Agent.

commission, it is therefore materially different from all former precedents, and as it does not pursue either the power or the precedents, it is not warranted, and must be quashed.

2. *STEPHENS v. COSTES*. E. T. 1762. K. B. 1 W. Bl. 423.

Action on the case against certain malt factors, for loading and unloading malt at the plaintiff's wharf without paying any duties for the same. On trial at Guildhall, the following special case was made:—By an order of privy council, 1st of May, 1674, reciting the stat. 22 Car. 2. c. 11. which enacts that a public wharf or quay left along the river side from the Temple to London Bridge forty feet wide, and that no vessel shall lie before the same longer than shall be necessary for the lading or the unlading of goods, without consent of several wharfingers, and that it shall be lawful for all persons to load or unload goods at the same time, paying for wharfage and cramage such rates as the king in council from time to time shall appoint. King Charles II. did appoint certain rates to be taken for all goods, brought into, shipped off, loaden or unloaden at Brook's wharf, and that the rates for malt was 6d. per score. That the plaintiffs were wharfingers and possessed of Brook's wharf, and entitled to the said rates. That the defendants were consignees of a loading of malt which was brought in a west country barge to Brook's wharf, which barge was fastened and lay at Brook's wharf, and unloaded a small part of her cargo upon the said wharf, and while she lay there fastened, the other part of her cargo was taken out and put on board lighters, and never landed on the wharf. The question is, whether the defendants are liable to pay the wharfinger according to the rates mentioned in the order of Council for such part of the cargo as was put on board the lighter, and never landed on the wharf.

*Per Cur.* Some cases are in themselves so plain, that reasoning upon them only serves to make them doubtful: of this nature is the present. To go by steps: the wharfingers do not contend that there is any meaning in the words "brought into," in the order of council, they not being found in the act of parliament; nor that any duty is payable for such part of the cargo as is not unladen at all; nor that any duty is payable for putting goods on board lighters in the river, when the barge is detached from the wharf. The particular circumstance on which the plaintiff founds his claim is, that the barge was fastened to the wharf. If any duty is due at all, it must be by the act of parliament. The act gives a duty for the wharfage and cramage, the nature of which duty is for laying goods upon the wharf. It differs specially from a duty for anchoring or mooring. In common speech, loading or unloading at a wharf signifies from or upon the wharf. We are extremely clear that this case is not within the act; the advantage of mooring is different from that of unloading. And for the unloading another duty is payable if the goods are sent to other wharfs. It is said here is an injury to the wharfinger in making use of his piles for mooring. But the remedy is left the same as before the act, besides that the practice, if unnecessary, is particularly forbidden by the statute. An action on the case, or perhaps other remedies, will lie for the wharfinger, or he may cut off the cordage by which they fasten.

3. *BOLT v. STENNETT*. T. T. 1800. K. B. 8 T. R. 606.

*Per Cur.* In justifying (in a plea on an action of trespass) the use of a crane in a public wharf, it is sufficient to say, that it is "a public, open, and lawful wharf," without claiming the right of immemorial usage.

See 12 East, 531.

4. *RICHARDSON v. GOSS*. M. T. 1797. C. P. 3 B. & P. 119.

A., of Newcastle shipped for London to order of B.; before their arrival, B. wrote to say that he was in failing circumstances, and would not apply for the goods on their arrival. To this A. returned a general answer, without making any mention of the goods, but immediately left Newcastle for London, and on his arrival applied at the wharf of C., where the goods in the meantime had arrived, (and where goods shipped for B. were landed and kept till sent for by him), tendering the freight and charges paid for the goods, and re-

And it has been hold en under the 22 Car. 2 c. 11. that the wharfin gers in Lon don are not entitled to wharfage for goods unladen in lighters out of bar ges fasten ed to their wharfs.

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In pleading the exist ence of a wharf its origin need not be shown.

[ 396 ] quiring a delivery of them; which was refused, unless upon payment of a general balance due from B. to C. for wharfage. Held, that the contract as between A. and B. having been rescinded previous to the arrival of the goods, C. had no right to retain against A. for a general balance due to him from B., though it was admitted that as against the consignor the wharfinger had a general lien. See 1 Esp. 109; 3 Id. 81; 4 Id. 93.

general balance on goods transferred to another after order and before receipt.

**Wife.** See *ante*, tit. *Baron and Feme*,

**Wild Fowl.** See *ante*, tit. *Game*.

**Will.** As to *Devisees or Wills of Land*, See *ante*, vol. viii p. 86.

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I. RELATIVE TO THE ORIGIN AND GENERAL NATURE OF.\*

II RELATIVE TO BY WHOM IT MAY, OR MAY NOT, BE MADE.† See this subject fully discussed, *ante*, vol. viii. p. 97.

\* A will or testament is defined to be the legal declaration of a party's intentions, which he directs to be performed after his death; 2 Bl. Com. 499, 500. A will may relate either to real or to personal property. In the former case it is denominated a devise, see *ante*, tit. *Devise*, which is an appointment of a person to take in the nature of a conveyance, although fluctuating till the testator's death, and will pass only such estate as he was seized of at the time of making it, 4 Bac. Abr. 242; 2 Bl. Com. 378, 501; 1 P. Wms. 575; Ambl. 619; 1 Ves. 141; 2 Ves. jun. 427; the right to devise arising from the stat. 32 Hen. 8. c. 1. which, we have seen, *ante*, tit. *Devise*, enacts that persons having lands may devise the same. A will, as it respects personal property, and to which our attention under this title is to be confined, if an indefinite disposition of all the testator may be possessed of at his death, 1 Ves. 141; 1 P. Wms. 598; 2 Ves. jun. 427. inclusive of chattel leases, whether they were his at the time of making his will or not, 1 P. Wms. 575.

† A will may be void from the incapacity of the party making it. There are three grounds of incapacity: the want of liberty, or free will; and the criminal conduct of the party; 2 Bl. Com. 496, 497. To the first are subject by the express provision of the stat. 34 & 35 Hen. 8. c. 5. all infants under the age of twenty-one years in regard to lands; 1 Sid. 162. stat. 34 & 35 Hen. 8. c. 5. s. 14. In respect to personal estates, infants under the age of fourteen years, if males, and of twelve years if females, are incompetent to

## III. RELATIVE TO THE FORMAL REQUISITES OF.

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bequeath the same, 2 Bl. Com. 496, 497; after that period their incapacity ceases: although, on the one hand it has been strangely asserted, that an infant of any age, even of four years old, may take a testament of personal property, Perkin, s. 503; but that seems an error of the press for fourteen, *vide* Harg. Co. Litt. 89. b. n. 6; and on the other, he has been denied before eighteen to be competent, Harg. Co. Litt. 89. b.; yet this as a matter of ecclesiastical cognizance, must be determined by the ecclesiastical law, which has prescribed the rule as above stated; 2 Bl. Com. 497; Harg. Co. Litt. 89. b. n. 6. But, if the testator, of whatever, age, were not of sufficient capacity, that will invalidate his testament. By the above-mentioned statute of the 34 & 35 Hen. 8. a will of lands made by an idiot, or by any person of non-sane memory, is declared void. Persons afflicted with madness, or any other mental disability, idiots or natural fools, distemper or drunkenness, are all incapable of making a will of personal estates during the existence of such disability; in this class also may be ranked those persons who may have been born deaf and blind, or have ever wanted the common sources of understanding; 2 Bl. Com. 497. But a will is not affected by the subsequent insanity of the testator; 4 Co. 60. And if a testator is subject to insanity, a will made during a clear lucid interval will be established; Clerk v. Cartright, 1 Phill. Rep. 90. White v. Driver, *Ibid.* 84; 1 Dow's Rep. 178. In respect of the incapacity arising from the want of liberty or freedom of will, prisoners, captives, and the like, are not, by the law of England, absolutely disabled to make a testament; but the Court has a discretion of judging, whether, from the special circumstances of duress, such acts shall be construed involuntary. A married woman is also precluded by the aforesaid stat. 34 and 35. Hen. 8. from devising lands; nor has she the power of bequeathing personal estate. Her personal chattles belong absolutely to the husband. He may also dispose of her chattels real, and he shall have them to himself in case he survive; an interest which necessarily precludes her from such an alienation; 2 Bl. Com. 497, 498; 4 Co. 51; 34 and 35 Hen. 8. c. 5. s. 14. Yet by the licence of the husband, she may make a testament; and on marriage, he frequently covenants with her friends to allow her that privilege; Dr. and Stud. 1. c. 7; 4 Bac. Abr. 244.; 2 Stra. 891. So where he stipulates that personal property shall be enjoyed by the wife separately, it must be so enjoyed with all its incidents; one of which is the power of disposition by a testamentary instrument; 4 Bac. Abr. 244. in not.; 3 Bro. Ch. Rep. 8; 1 Ves. jun. 46. And where she has such power over the principal, it extends also to its produce and accretions; 2 Vern. 534; Prec. Ch. 44. 355. If the husband be banished for life by act of parliament, the wife is entitled to make a will; 4 Bac. Abr. 244.; 2 Vern. 104. So, where personal property is given in trust for the sole and separate use of the married woman, she may dispose of it by will without the husband's assent; 3 Bro. Ch. Rep. 8; 1 Ves. jun. 46; Tappenden v. Walsh, 1 Phil. Rep. 352. A *feme covert* may also make a will of effects of which she is in possession in *autre droit* in a representative capacity, for they never can be property of the husband; Off. Ex. 87; Godolph. 1. 10, 11; Vin. Abr. 141. The queen consort has a general right to dispose of her personal estate by will without consent of her lord; Harg. Co. Litt. 133. Persons incompetent by their crimes, as all traitors and felons without benefit of clergy from the time of their conviction and attainder, or outlawry, which amounts to the same; for then their property is no longer at their own disposal, but is altogether forfeited; 2 Bl. Com. 499; 4 Bl. Com. 380, 381. 387; Bac. Abr. tit. Outlawry; 2 Hale, P. P. 205; Godolph. Pl. c. 12. s. 8. In case a traitor or felon without benefit of clergy shall die after conviction and before attainder, his lands shall pass by his will, but not by his goods or chattels, for the former are forfeited only on attainder, the latter on conviction; 4 Bl. Com. 387.

Nor shall the will of a *felo de se*, so far as it respects goods and chattels, have

## (A) OF ITS BEING IN WRITING, OR NUNCUPATIVE.\*

any operation, for they are forfeited by the act and manner of his death; but a devise of his lands shall be effectual, for them no forfeiture is incurred; Plowd. 261; Swinb. 106. 4 Bac. Abr. 247; 4 Bl. Com. 386; 3 Inst. 55. As is also that of a party guilty of felony, not punishable with death, for he forfeits only his goods and chattels; 4 Bl. Com. 97; Co. Litt. 391. And a felon of every description may devise lands in gavelkind, for land of this tenure are not forfeited by felony, 2 Bl. Com. 84; 4 El. Com. 386; Lamb. Peramb. 634. Outlaws also, though merely in civil cases, are intestable while their outlawry subsists; for their goods and chattels are forfeited during that time; Fitzh. Abr. tit. Descent 16; 1 Salk. 109; *sed vid.* Cro. Eliz. 851. As for persons guilty of other crimes inferior to felony, as usurers and libellers, they are not precluded from making testament, Godolph. Pl. c. 12; nor, as it seems, is a party excommunicated; Off. Ex. 17. An alien with whose country we are at war, if he have not the king's licence to reside here, express or implied, is, by our law, incapable of making a will; but if he have such licence, he, as well as an alien friend, may bequeath his personal estate; 1 Bl. Com. 372; 1 Lutw. 34; 1 Woodes. 374. They can neither of them acquire any permanent property in land. They may indeed hire or take leases for years of houses for habitation, 1 Bl. Com. 371. 372; 7 Co. Rep. 17; Hargr. Co. Litt. 2. p.; which chattel interests, it seems, they may dispose of by will; Hargr. Co. Litt. 2. b. not 8; 1 Anders. 25. N.; Bendl. 36.; *vid.* also Cro. Car. 8; *sed vid.* Co. Litt. 2. b. But the stat. 32 Hen. 3. c. 6. s. 13. makes void all leases of houses or shops to an alien artificer or handicraftsman. And this law, however contrary it may appear to sound policy and a spirit of commerce, is still in force; but in favour of aliens it has been construed very strictly; Hargr. Co. Litt. 2. b. not 7; *vid.* 1 Sid. 309; 1 Saund. 7; 2 Show. 135; 3 Mod. 94; 3 Salk. 29; See *ante*, tit. Aliens.

\* A will is of two species, written and nuncupative; if the former it may be committed to writing, either by the testator himself or by his directions; nor is the affixing of his seal to the instrument, nor the presence of witnesses at its publication, essential to its validity as regards personal property, except money in the public funds; yet it is safer and more prudent, and leaves less in the breast of the ecclesiastical judge, if it be not only signed by the testator, but also published in the presence of witnesses; 2 Bl. Com. 501, 502; Godolph. Pl. c. 21. s. 2. *vide* Com. Rep. 451. With regard to nuncupative wills, the unqualified allowance of them was found productive of the greatest frauds, and it became necessary to subject them to very strict regulations. Accordingly by the stat. 29 Car. 2. above mentioned, it is enacted that no such will shall be good, where the estate thereby bequeathed shall exceed that value of thirty pounds, that it is not proved by the oaths of the three witnesses at the least who were present at the making thereof (who by the stat. 4 and 5 Ann. c. 16. must be such as are admissible on trials at common law); nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present or some of them bear witness that such was his will, or to that effect; nor, unless such nuncupative will were made in the time of the last sickness of the deceased, and in his dwelling-house, or where he had been resident for the space of ten days, or more, next before the making of such will, except where such person was taken sick from home, and died before his return; nor after six months past speaking the pretended testamentary words, shall any testimony be received to prove any will nuncupative, except the testimony or the substance thereof were committed to writing six days after making the said will; Miller v. Miller, 3 P. Wms. 356. Soldiers in actual military service, and mariners, or seamen, at sea, are exempted from the provisions of this act. The former may at this day make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms and solemnities which the law requires in other cases; 1 Bl. Com. 417; stat. 29 Car. 2. c. 3. s. 23; 5 W. 3. c. 21. s. 6. But,

## (B) OF ITS BEING JOINT.\*

## (C) OF THE TESTATOR'S SIGNATURE.†

## (D) OF WITNESSES TO.‡

with respect to the latter, this licence no longer exists. The perpetual impositions practiced on this meritorious and unsuspecting body of men induced the legislature to adopt a new policy, and to divest them of a privilege, which, instead of being beneficial to them, was perverted to purposes the most injurious. Many salutary regulations are accordingly prescribed by the stats. 26 Geo. 3 c. 63. and 32 Geo. 3. c. 34. in regard to the making and probate of the wills of petty officers, and seamen in the king's service and non-commissioned officers of marines serving on board a ship in the king's service.

\* Probate refused to a mutual or conjoint will, as an instrument unknown to the testamentary law of this country. *Qu.* As to its effect in equity as a compact and raising a trust; see *Hobson v. Blackburn*, 1 Add. Prer. 274; and see *Dufeur v. Peraro*, 2 Hargr. jun. Ex. 101; *Lord Walpole v. Cholmondeley*, 7 T. R. 138; 3 Ves. 403.

† The signature, witnesses, and other formalities required by the Statute of Frauds as essential to a legal devise of land have already been fully stated; see vol. viii. p. 113; and with regard to personal property, although the testator's seal, or attestation, or even signature, be omitted, 3 Phill. Rep. 135. still a testamentary memorandum may operate as an available disposition of personal estate; yet if, on the omission of either of those solemnities, a fair presumption may be raised of an abandonment of intention on the part of the deceased, or that his intention was mere ambulatory, the instrument shall have no effect. Thus, where a party wrote a paper purporting to be a testamentary disposition of his property, to which a clause of attestation was added but not filled up, the Court thought it reasonable, from the want of witnesses, to infer that he had changed his mind, and pronounced for an intestacy. So, where the party had merely sealed the paper propounded for a will without signing it, from the omission of the signature the inference and decision were the same. In these and like cases, the framer of the instrument appears evidently to have contemplated a farther solemnity as essential to its perfection; and such solemnity not having been superadded, and the instrument being left inchoate and imperfect, a change of intention may reasonably be presumed; *Mathews v. Warner*, 4 Ves. jun. 186; and 5 Ves. jun. 23; *Griffin's case*, cited in *Mathews v. Warner*, and in *ex parte Fearon*, 5 Ves. jun. 644; and *Coles v. Trecothick*, 9 Ves. jun. 249; and see *Walker v. Walker*, 1 Meri. Rep. 503. But such presumption may be repelled by evidence, as by showing that the party was suddenly arrested by death, or incapacitated by illness, before the instrument could be conveniently perfected; *Baillie v. Mitchell*, in Prerog. Court, 1805; or by proving his recognition of it in extremis.

‡ A witness to a written will, we have seen, is not essential to a will of personal property, except under the Stat. 33 Geo. 3. c. 28. s. 14; and 35 Geo. 3. c. 14. s. 16. it is enacted, that all persons possessed of any share or interest in the funds, or any estate therein, may devise the same by will in writing attested by two or more creditable witnesses. But it has been adjudged that, although the same should not be so bequeathed, yet it devolves on the personal estate; 7 Ves. jun. 452. By the stat. 25 Geo. 2. c. 6. all legacies given by will, or codicil, two witnesses of the same are declared void; 2 Bl. Com. 377; 4 Burn. Eccl. 78. This act extends to wills disposing of personal property only; *Lees v. Summerwell*, 17 Ves. jun. 508. A deed to take effect on the death of the wife's mother, or the sale of a certain estate, although intitled "a deed of gift," and a recommendation to his executors to consider that a most solemn obligation in confirmation of which he had set his hand and seal, held to operate as a will; *Corp v. Corp*, 1 Phill. Prer. 11.

So, a deed of gift to take effect after his death, and whereby upon delivery of sixpence the party gave, granted, &c.; administration granted; *Shergold*

[ 400 ] *v. Shergold*, 1 Phill. Prer. 10. So, a deed of gift of all his estates after his death; administration granted with the deed as a testamentary schedule annexed; *Mackwick v. Taylor*, 1 Phill. Prer. 10. So, a Scotch settlement in the form of a contract, but to take place on the death of one of the contracting parties, admitted to proof; *Hog v. Lashley*, 1 Phill. Prer. 11. Where an unfinished draft is propounded, it must be shewn that the deceased was prevented by invincible necessity, or by the act of God from completing it; the length of time it has been left unfinished, though not of itself sufficient, where there is any evidence of subsequent recognition to induce the rejection of such a paper, creates a strong presumption against it; where therefore two papers were propounded, executed and attested, but containing no disposition of the residue, and a new draft was prepared four months anterior to the decease, with abundant opportunity to execute it, and it appeared that subsequently to the preparing such draft the deceased actually executed a will for the disposal of real estates, and that during his last illness he made no reference to such draft, the Court rejected the plea; *Sandford v. Vaughan*, 1 Phill. Prer. 39.

Where the testator had regularly executed a will a short time previously to his death, the Court refused to establish as codicillary an unfinished paper found in his desk, where nothing appeared to show that he was prevented from duly executing it, or meant to conclude it, or that he ever, in any way, referred to it as a testamentary act; *Carstairs v. Pottle*, 2 Phill. Prer. 30. The rule is, that, where there is a regular will, and another paper begun as a new will, which the testator has been prevented by the act of God from completing, the two papers may be taken together as the will of the deceased, and operation to give *pro tanto* to the latter paper, provided the proof of final intention be clear, but it will not wholly revoke the former. *Ib.* 35. A paper fairly written, complete as a disposition, and evidently intended to operate as a will, pronounced valid, although neither subscribed nor executed, nor appointing an executor; *Read v. Phillips*, 2 Phill. 122. Where several unfinished papers were propounded, the Court held that it was bound to inquire into the intention with which they were written, and might collect that intention from other papers and parol evidence; and it being satisfactorily proved that a paper unfinished and of a later date was originally intended as a new will, and had been recognised as such, it might be taken in conjunction with the former, as containing together the will of the deceased; the latter superseded the other only *pro tanto*; *Harley v. Bagshaw*, 2 Phill. Arch. 48. It is the very province of the Court of Probate to inquire into such intention; *Ib.* Probate of a codicil, an unfinished paper recalled upon evidence of abandonment, *Satterthwaite v. Satterthwaite*, 3 Phill. Prer. 1. So, an unfinished paper, "What I purpose to be my will," where nothing appeared to have prevented its completion, or to show that the deceased regarded it as his will, or meant it to operate in that shape, the Court refused probate; *Roose v. Mouldsdales*, 1 Add. Prer. 129.

It is competent to any one of the next kin to submit the validity of a testamentary paper to the consideration of the Court, notwithstanding the consent of the others to probate; *Ib.* 138. A paper written in the life-time of the party conformable to his immediate instructions, but the execution of it prevented by intervening incapacity, established as a will though not written in his presence, nor read over to the testator; *Sikes v. Smith*, 2 Phill. Prer. 385. A will in the hand-writing of the testator, with an attestation clause; but not witnessed, was decreed probate, there being strong circumstances to show that he intended it to operate in that form. The presumption from such an omission, that he intended doing something more, is slight, and may be repelled by slight circumstances; *Harris v. Bedford*, 2 Phill. Prer. 177. Where a testator had executed a completely formal will, and two codicils formally drawn and subscribed, and a paper was also propounded written in pencil, neither dated nor signed, describing persons only by initials, and not even referring correctly to the will, supported only by evidence of hand-writing and



## (E) OF ITS BEING A COMPLETE OR IMPERFECT TESTAMENTARY PAPER. \* [ 401 ]

sanity at the time, the Court rejected the allegation; *Rymes v. Clarkson*, 1 Phill. Prer. 22. And where it had been in the executor's possession for three years, called in, and revoked; *Scott v. Rhodes*, 1 Phill. Prer. 12.

\* Where it appeared that the paper was written in a moment of levity, and intended clearly to be merely a compressed imitation of another paper shown him at the time, and not operative as a will, or ever recognised as a subsisting will, held that it wanted the great requisite of a will, the *animus testandi*, and could not be construed into a testamentary disposition. Held also that, as the *animus testandi* is the very point into which the Court of Probate is to inquire, the witness might be examined as to circumstances under which it was made, but such witness is to be carefully heard by the Court; *Nichols v. Nichols*, 2 Phill. Prer. 180. Where a party in the entire absence of disorder, and of perfect capacity, directed his solicitor to take down instructions for a will, which were read over and approved of by him, and in which he expressed a clear intention that his wife should be left exactly as his brother had left his wife, and to whose will he had been executor; the Court established such instructions with his brother's will so referred to, as the will of the deceased, but struck out an additional clause which had been inserted by the solicitor after the testator's decease under a misapprehension of the testator's meaning, in reference to the different circumstances of the testator's decease from that of his brother, viz. the dying without issue; *Wood v. Wood*, Prer. 1811; 1 Phill. 357. In all cases where a paper written in the life-time of the testator, but not reduced into writing in his presence, nor read over to him, has been established, the principle is, that the intention of the testator was perfectly clear, and that the paper was exactly conformable to such clear and decided intention; and the more distinct and deliberate it was at the time, the more clear should be the proof of any subsequent alteration; *Ibid.* 370; and see *Bury v. Bury*, Prer. 1791; *Campbell v. Campbell*, Prer. 1797; *Wingrave v. Bye*, Prer. 1799; *Simpson v. Temple*, Prer. 1801; *Hoare v. Heyes*, 1807. Where the question is, whether a paper was intended as the final declaration of his mind, or merely preparatory to a more formal disposition, the material with which it is written becomes an important circumstance, particularly where the deceased made his will, and other codicils, formerly written in ink, the rational conclusion is that it was a mere memorandum for future deliberation, and not a finished instrument; *Sanford v. Vaughan*, 1 Phill. Prer. 36. So, in considering the want of date and signature; *Ibid.* So, where the paper refers inaccurately to former dispositions in the will, and the parties are described only by initials; these are more characteristic of loose memoranda than of a final instrument, deliberately intended to operate; *Ib.* 37.

Where a paper contains mere instructions, and only a part of the intended disposition, to establish it by circumstances two points are necessary; 1st. That the Court be completely satisfied that the deceased had finally decided to give those legacies; 2d. That he never abandoned that intention, but was only prevented by the act of God from proceeding to the completion of his will. Where, therefore, the whole matter was left open to the re-consideration and revision of the deceased, the Court said they would not grant probate of a paper of this description, without the strongest evidence that his intention was fixed; and as stopping in the middle is a presumption that he did not intend to proceed to execution, the *onus probandi* lies on the part of those who set it up to show the full determination of mind on the part of the deceased; and on the other hand, the inevitable incapacity which prevented him from executing it; a dislike to proceed, or an appearance of not having made up his mind, where there was a full capacity of business, and sufficient time, coupled with a vacillating character of the party, are fatal to such a conclusion; and the Court refused; in such a case, to admit instructions to proof; *Devereux v. Bullock*, Prer. 1809; 1 Phill. 60.

Where the intention to die testate was clear, and the party, under an appre-

## IV. RELATIVE TO CODICILS.\*

hension of death, left town to see his solicitor, to whom he dictated the instructions propounded, and the next day what had been written down upon his dictation was read over to him, and approving; and after suggesting something in addition, he expressed himself, "that he had now nothing to do that required a thought," and directed the whole to be made out fair, and brought to him to sign, but he was seized with a fit and died in the interim. The Court held that the instrument was not less operative for the disposal of his property; *Huntingdon v. Huntingdon*, 2 Phill. Prer. 213.

Where a party, having duly made a will disposing of his whole property, afterwards made another will, which he stated that he had made in case the former will should be by any of his relations disputed, and nine years after, and just immediately before his decease, at the instigation of his friends, drew up a paper of instructions for a new will, which he signed where he had stopped, and the next day sent for a person to make his will, but directly recognized the original instrument as then subsisting; the Court pronounced for that and that the paper of instructions, as containing together the will of the deceased, and that the conditional will was not converted into an absolute one by the proceedings instituted to ascertain the intention of the testator. *Litigation*, in the sense of the condition, means vexatious litigation, where no *probabilis causa*; *Ingram v. Strong*, 2 Phill. Prer. 294.

Unfinished instructions, where there is a complete will, only revoke such will as far as they go. They are not a codicil to be taken in addition, but revocative as far as they go, and to be taken in conjunction with the will; *Ib.* 312. Where a paper is codicillary, and two legacies are given to the same person, they are cumulative; *Ibid.* Where there is a complete will, and an instrument intended as the inception of a new will, but not completed, the latter legacy supercedes and revokes the former and is substituted in the place of it. But unfinished instructions admitted to probate, the intention of the party being clear, and the completion prevented by death alone, although there was nothing beyond mere acquiescence *Musto v. Sutcliffe*, 2 Phill. Prer. 104. Instructions for a codicil communicated to the solicitor by a third person, and reduced into writing in the life-time, but execution prevented by death, admitted to proof; *Lewes v. Lewes*, 3 Phill. Prer. 109. Where the solicitor taking instructions only noted down the legacies, but not the residuary bequest, and the same was not reduced into writing in his life-time, probate as to that refused; *Rookell v. Youde*, 3 Phill. Prer. 141.

An extract from a letter written during a voyage, expressive of testamentary

\* A codicil is a supplement to a will annexed to it by the testator, and to be taken as part of the same either for the purpose of explaining, or altering, or of adding to, or subtracting from, his former dispositions; 2 Bl. Com. 500; Swinb. part 1, s. 5. A codicil may be annexed to the will, either actually or constructively. It may not only be written on the same paper, or affixed to, or folded up with, the will; but may be written on a different paper, and deposited in a different place. A codicil may be annexed either to a devise of lands, or to a will of personal estate. To alter the former, a codicil must, by the Statute of Frauds, be in writing, and signed by the deviser, or some other person in his presence, and by his express directions, and be subscribed in his presence by three or four credible witnesses; 1 P. Wms. 344; and note 1; *Ibid.* Dougl. 244, note 2; *Ellis v. Smith*, 1 Ves. jun. 11.

So a will of personal estate may be either written or nuncupative, provided, in case of its being the latter, it merely supply an omission in the instrument. Therefore, A. having disposed of part of his effects by his will in writing, may dispose of the residue by a nuncupative codicil; Com. Dig. Devise; Raym. 334. But such codicil does not operate so as to repeal or alter a will. A written codicil respecting personal estate is authenticated in the same manner as a will of such property.

**Windows.** See *ante*, tit. *Lights*.

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**Wine.**

1. **REX v. COMMISSIONERS OF EXCISE.** E. T. 1788. K. B. 2 T. R. 381.

Buying is dealing under the 6 Geo. 3 c. 59. s. 4.

It appeared by affidavits that one Parker, proposing to take up the business of a dealer in foreign wine, on the 15th of June, 1787, gave orders for a parcel of wines from Oporto. On the 19th June, he purchased six pipes of port at a public sale of wines by auction, to remove which to his vaults he regularly obtained a permit from the office of excise. In September last he sold two pipes (his wine from Oporto not being then arrived), and, in order to enable them to deliver them, he took out a licence, directed by 6 Geo. 3. c. 59. s. 8. to be taken out by persons dealing in foreign wines, and made the entry s. 12. of the vaults; of which he gave notice to the excise officer, requesting the officer to take an account of his stock. The officer refused to give credit for the wines in his cellar, though the permit was shown to him, assigning as a reason, that the permit was dated before he had taken out his licence, or made an entry of his vaults. Parker swore that he did not intend to commence the business till the arrival of his wine from abroad, and that he had no intention of defrauding the revenue.

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*Per Cur.* The first question is, what is meant by a dealer in the 6 Geo. 3. c. 21. We are of opinion that, according to the true construction of it, a buyer is a dealer for this purpose: this bears no analogy to the case of bankrupts within the bankrupt laws; for there the words of the statutes 13 Eliz. c. 7; 21 Jac. 1. c. 19. s. 2. are "a person who seeks his living by buying and selling," therefore to constitute a trader within those acts there must be both a buying and selling. But here the words are in the disjunctive, "deal in or sell," and we cannot vary the meaning of them by construing them to be buying and selling; dealing must mean something which does not include selling. It is enacted by the eighth section, that no person shall deal in or sell wine without first taking out a licence, therefore any person who intends to become a dealer must, under this act, take out his licence before he does any act of dealing, and buying is an act of dealing.

intentions, not allowed to operate as a codicillary disposition, where the party returned home, lived many years after, and never in any way recognized or referred to it, but something contrary to it was to be inferred from private memorandums produced; *Passmore v. Passmore*, Prer. 1811, 1 Phill. 216. It is not a conclusive objection to an instrument that it is in the form of a letter, if it contain instructions as to the disposition of the property in the event of death; nor need it be in direct and imperative terms. Wishes and requests have been deemed sufficient, *Ib.* 218; and see *Matthews v. Warner*, 4 Ves. jun. 186. Letters of a testamentary nature written previous to the testator's leaving the country, held not revoked by his return, where he distinctly recognized them as the intended disposition of his property; admitted to proof; *Strauss v. Schmidt*, 3 Phill. Prer. 209.

A codicil in the form of a letter addressed to the testator's nephew, intended as a confidential trust, and not to be communicated until after his death, found uncancelled and unrevoked; established, notwithstanding a subsequent will containing a revocatory clause; *Denny v. Barton*, 2 Phill. Prer. 575. A person superscribed, "heads of a will," in which subsequent alterations were proved to have been made, and that in his last sickness, on being urged by a friend to make his will, the testator said, "that he had written the heads of his will, and signed it, and that it would do very well;" and on being urged to make it more formally, he said he would, but that which he had already written would do very well, and he died shortly after; the Court established the paper; but rejected a mere memorandum of the items contained therein; *Bone v. Spear*, Prer. 1811. 1 Phill. 345; affirmed in *Deleg.* 1816.

2. *COOK v. SHOLL*. E. T. 1793. K. B. 5 T. R. 255.

And where a permit is to be in force one hour after, &c. and two days more for being delivered into, &c. the two days are computed at 24 hours each.\*

This action of trover, for several pipes of wine, was tried before Heath, J. It appeared that the plaintiff, who was a wine merchant, had purchased these pipes of one Hicks; which the defendants seised on the quay at Gloucester, for want of a permit; and it appearing to be a malicious seizure, the jury gave a verdict for plaintiff with 150*l.* damages. The defendant had prosecuted this seizure in the Court of Exchequer, and the record of acquittal was read in evidence. The defendant at the trial insisted that the permit given with the wine was out of time, the seizure being made between three and four o'clock in the afternoon on the 20th of July. The learned judge was of that opinion, but it being suggested that a different determination had been made in the Court of Exchequer, he saved the point for the opinion of this Court, with liberty to enter a verdict for the defendant if it should be adjudged with him. The permit which was annexed to the report, after stating the quantity and description of the wine, was as follows: "This permit to be in force for one hour from the time of being taken out of Mr. Hicks's stock, and two days more for being delivered into the stock of Mr. John Cooke, granted 18th of July, morning, nine." The question, therefore, between the parties was, whether the two days expired at ten on the morning of the 20th, or whether the permit continued in force for the whole of that day. The Court thought that on the true construction of the permit, no doubt could be entertained but that the time was out when the seizure was made, and therefore there must be a verdict entered for the defendant.—Rule absolute.

[ 405 ] **Witnesses.**

## I. RELATIVE TO WHO ARE, OR ARE NOT, COMPETENT AS.

## (A) IN GENERAL.

- (a) From infamy of character, p. 410. (b) From want of religion, p. 410. (c) From want of understanding, p. 411. (d) From interest, p. 411. (e) From relative situation, p. 414. (f) Of restoring the competency, p. 414.

## (B) IN PARTICULAR.

1st. *As to instruments.*

- (a) As to annuities. See tit. Annuity. (b) Appraisements. See tit. Appraisalment. (c) Connected with Apprentices. See tit. Apprentice. (d) As to attorneys. See tit. Attorney. (e) As to arbitration contracts. See tit. Arbitration and Award. (f) As to bail-bonds. See tit. Bail. (g) As to bills of lading. See tit. Lading, Bills of. (h) As to bills and notes. See tit. Bills and Notes. (i) As to charter-parties. See tit. Charter-party. (j) As to Bonds. See tit. Bonds. (k) As to check. See tit. Check. (l) As to composition deeds. See tit. Composition Deeds. (m) As to Covenants. See tit. Covenants. (n) As to deeds. See tit. Deeds. (o) As to East India Company Contracts. See tit. East India Company. (p) As to feoffments. See tit. Feoffments. (q) As to frauds, contracts connected with the statute of. See tit. Frauds, Statute of. (r) As to grants. See tit. Grants. (s) As to guarantees. See tit. Guarantees. (t) As to indemnity bonds. See tit. Indemnity. (u) As to insurance policy contracts. See tit. Insurance, Policy of. (v) As to leases. See tit. Lease. (w) As to marriage contracts. See tit. Marriage. (x) As to mortgages. See tit. Mortgage. (y) [ 406 ] As to offices, contracts relating to the sale of. See tit. Office. (z) As to partners and partnership contracts. See tit. Partners and Partnership. (a 1) As to receipts. See tit. Receipts, and the heads there referred to. (b 1) As to ship and shipping. See tit. Ship and Shipping. (c 1) As to Warranty. See tit. Warranty.

2d. *As to property.*

\* A statement in an information that the wine is liable to forfeiture, upon being imported in casks of less than twenty-five gallons, without specifically negating the exceptions in Geo. 2. c. 17. is good after verdict; and the crown need not prove the quality of the wine; *Attorney-General v. Sheriff, Forrest*. 43.

(a) *Real property.*

See tits. Covenant, Fixtures, Fraud, Statute of, Grant, Heir, Inclosures, Landlord and Tenant, Lease, Power, Release, Rent, Repairs, Replevin, Taxes, Use and Occupation.

(b) *Personal property.*

See tits. Accounting, Action for not, Account Stated, Action, Apothecary, Apprentice, Attorney, Auction and Auctioneer, Bail, Bailment, Banker, Bank of England, Bankrupt, Baron and Feme, Barrister, Bastard, Bills and Notes, Carrier, Check, Compostion with Creditors, Contribution, Copyright, Corporation, Debtor and Creditor, Deceit, Distress, Ecclesiastical Persons, Election, Escape, Executor and Administrator, Fixtures, Frauds, Statute of, Freight, Goods Bargained and Sold, Goods Sold and Delivered, Guarantee, Indemnity, Infant, Innkeeper, Insolvent Debtor, Insurance, Interest, Joint Stock Company, Landlord and Tenant, Legacy, Lien, Maintenance, Marriage, Promise of, Master and Servant, Money had and Received, Money Lent and Advanced, Money Paid, Mortgage, Officer, Overseer, Pardon, Parent and Children, Partner, Party-wall, Physician, Poundage, Principal and Agent, Principal and Surety, Printer, Prize, Respondentia, Reward, Salvage, Sheriff, Ship and Shipping, Simony, Smuggling, Spirituous Liquors, Stamps, Sunday, Theatres, Tithes, Tolls, Trustees, Use and Occupation, Usury, Wager, Work and Labour, Warranty, Waste.

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3rd *As to services.*

1. Agents. See ante, Principal and Agent. 2. Apothecary. See ante, tit. Apothecary. 3. Apprentices. See ante, tit. Apprentice; Master and Servant. 4. Arbitrators. See ante, tit. Arbitration and Award. 5. Attorney. See ante, tit. Attorney. 6. Auctioneers. See ante, tit. Auction and Auctioneer. 7. Bail. See ante, tit. Bail. 8. Brokers. See ante, tit. Principal and Agent. 9. Carrier. See ante, tit. Carrier. 10. Counsel. See ante, tit. Barristers. 11. Executors and Administrators. See ante, tit. Executor and Administrator. 12. Factor. See ante, tit. Principal and Agent. 13. Guarantees. See ante, tit. Guarantee. 14. Husband and Wife. See ante, tit. Baron and Feme. 15. Infants. See ante, tit. Infant. 16. Mechanics. See post, tit. Work and Labour. 17. Messengers upder commission of bankrupt. See ante, tit. Bankrupt. 18. Parish Officers. See ante, tits. Churchwardens, Overseers, Parsh Officers. 19. Partners. See ante, tit. Partner and Partnership.

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4th. *As to individuals.*

(a) Agents. See tit. Principal and Agent. (b) Aliens. See tit. Alien. (c) Assignees. See tits. Bankrupt, Bond, Covenant, Debtor and Creditor, Deed, Insolvent Debtors, Lease, Remainder, Reversion, Way, Right of (d) Auctioneers. See tit. Auctioneer. (e) Bankrupts. See tit. Bankrupts. (f) Bastard. See tit. Bastard. (g) Brokers. See tit. Principal and Agent. (h) Churchwardens. See tit. Churchwardens. (i) Clergymen. See tit. Ecclesiastical Persons. (k) Commissioners. See tits. Bankrupt, Customs, Excise, Inclosure, Insolvent Debtor, Lunatic. (l) Drunkards. See tit. Intoxication. (m) Duress, persons under. See tit. Duress. (n) Executors and Administrators. See tit. Executor and Administrator. (o) Feme coverts. See tit. Baron and Feme. (p) Gamblers. See tit. Gaming. (q) Government Agents. See tit. Government Contracts. (r) Husband and wife. See tit. Baron and Feme. (s) Idiots. See tit. Idiots. (t) Infants. See tit. Infant. (u) Lunatics. See tit. Lunatics. (v) Married women. See tit. Baron and Feme. (w) Outlaw. See tit. Outlawry. (x) Overseers. See tit. Overseer. (y) Partners and Partnership. (z) Servants. See tits. Master and Servant; Principal and Agent. (a 1) Smugglers. See tit. Smuggling. (b 1) Stockbrokers. See tit. Stockjobbing. (c 1) Trustees. See tit. Trustees.

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**II. RELATIVE TO THE ATTENDANCE OF.**

(A) *SUBPENA*, p. 415.

(B) *HABEAS CORPUS*, p. 416.

- (C) SUBPŒNA DUCES TECUM, p. 417.
- (D) BEFORE JUSTICES, p. 417.
- (E) ——— COMMISSIONERS OF BANKRUPT, p. 418.
- (F) UNDER INCLOSURE ACT AND COURTS MARTIAL, p. 418.
- (G) NON-ATTENDANCE OF.
  - (a) *Action for*, p. 418.
  - (b) *By attachment*, p. 419.
- III. ——— EXPENSES OF, p. 420.
- IV. ——— EXAMINATION OF.
  - (A) IN CHIEF, p. 422.
  - (B) CROSS-EXAMINATION OF, p. 424.
  - (C) RE-EXAMINATION OF, p. 426.
  - (D) CREDIT OF WITNESSES, HOW IMPEACHED, p. 427.
  - (E) ——— SUPPORTED, p. 428.
  - (F) OF THE SOURCES FROM WHICH HE MAY DERIVE INFORMATION, OR REFER TO, p. 429.
- V. ——— WITNESSES ABROAD, p. 430.
- VI. ——— SECONDARY EVIDENCE IN RELATION OF, p. 430.
- VII. ——— THE PRIVILEGES OF, p. 430.
- VIII. ——— NUMBER OF.
  - (A) GENERAL RULE, p. 431.
  - (B) IN TRIALS FOR PERJURY, p. 431.
  - (C) ——— TREASON, p. 431.
  - (D) IN COURTS OF EQUITY, p. 432.
  - (E) — THE ECCLESIASTICAL COURTS, p. 432.
- IX. ——— CRIMINAL PROCEEDINGS. See *ante*, vol. x. from p. 511 to 513.

[ 410 ] I. RELATIVE TO WHO ARE, OR ARE NOT, COMPETENT.

(A) IN GENERAL.\*

(a) *From infamy of character.*

LEE V. GANSELL. H. T. 1774. C. P. Lofft. 376; S. C. Cowp. 3.

Infamy of character by judgment but not conviction occasions an incompetency.†

Objection to reading of an affidavit as evidence of conviction of perjury. It was held by *Lord Mansfield*, that conviction was not sufficient, unless judgment thereupon; he said he thought there did not exist a case in law where a conviction could be read before judgments. A man may move in arrest of judgment.

(b) *From a want of religion.‡*

\* In general, any one may be examined as a witness who has understanding and memory, and is capable of being bound by an oath.

† There are many offences which our law considers such blemishes on the moral character as to incapacitate from giving evidence in a court of justice, as treason and every species of the crimen falsi, such as forgery, perjury, subornation of perjury, attain of false verdict, and other offences of the same kind which involve the charge of falsehood, and affect the public administration of justice. Some kinds of punishment were formerly thought to be marks of infamy, and therefore witnesses were frequently rejected after standing in the pillory, or after branding, these being the usual punishments for crimen falsi. But the distinction is obvious, and now clearly settled; it is not the punishment, but the nature of the offence that causes infamy. Thus, it is no objection against the competency of a witness that he has been in the pillory for a libel on the government, or for a trespass, or a riot; he is not incompetent unless he has suffered for the crimen falsi, as for perjury, &c., in which case it is the crime not the punishment that incapacitates; and, on the other hand, after judgment for the latter kind of offence, he is not competent, though the punishment may have been only a fine. It is not the punishment but the crime that affects the competency of a witness. The rule most commonly laid down is, that a conviction makes the witness incompetent, but it is not to be understood the conviction alone incapacitates, for on a motion in arrest of judgment, it may possibly have been quashed. The judgment, therefore, as well as the conviction, must be proved, and can only be proved by the record, or by a copy of the record; 8 East, 99. Even an admission by the witness himself of his being in prison under judgment for grand larceny, or of his having been guilty of perjury on another occasion, will not make him incompetent, however it may affect his credit.

‡ The most correct and proper time for asking the witness whether the form in which

REX v. GILHAM. 1795. N. P. 1 Esp. 285.

Per Lord Kenyon, C. J. A Jew, who has never formally renounced the religion of his ancestors, but considers himself a member of the established church, may be sworn on the Gospels.

(c) *From want of understanding.*†

(d) *From interest.*‡

WALTON v. SHELLEY. T. T. 1786. K. B. 1. T. R. 296.

Ashhurst, J. The general rule is, that, where a man is not interested in the event, he shall be a competent witness, though he may have a bias upon his mind with regard to the subject matter. As, if a person bring two several actions against two defendants for the same battery, in the action against one the other may be a witness, because he is not interested in the event. Any objection to such testimony should go to the credit rather than to the competency of the witness.

the oath is about to be administered to him is one that will be binding on his conscience is before the oath is administered. But, although a witness shall have taken an oath in the usual form, without making any objection, he may, nevertheless, be afterwards asked whether he considers the oath he has taken to be binding on his conscience. But if the witness answer in the affirmative that he does consider the oath which he has taken to be binding upon his conscience, he cannot then be any further asked whether there be any other mode of swearing which would be more binding to his conscience than that which has been used; 2 B. & A. 284.

\* Atheists, and such infidels as do not profess any religion that can bind their consciences to speak the truth, are excluded from being witnesses. Lord Coke indeed says, generally, that an infidel cannot be a witness, in which denomination he intended to comprise heathens as well as Jews; and Mr. Sergeant Hawkins thought it a sufficient objection to the competency of a witness that he believed neither the Old nor the New Testament. Lord Hale was, however, of a different opinion, and strongly points out the unreasonableness of excluding indiscriminately all heathens from giving evidence, as well as the inconsistency of compelling them to swear in a form which they may possibly consider not binding. It were a very hard case, he says, if a murder committed here in the presence of a Turk or a Jew should be punishable because such an oath should not be taken which the witness holds binding, and cannot swear otherwise, and possibly might think himself under no obligation if sworn according to the usual style of the courts of England. All doubts upon this subject, however, are now removed in the case of Omchund and Barker, which came before Lord Chancellor Hardwicke, assisted by Lee, Chief Justice, Willes, Chief Justice, and Parker, C. B.; it was solemnly decided that the deposition of witnesses professing the Gentoo religion, who had been sworn according to the ceremonies of their religion under a commission out of Chancery, ought to be admitted in evidence. And it may now be considered as an established rule, that infidels of any other country who believe in a God, the avenger of falsehood, ought to be received here as witnesses, but infidels who believe not that there is a God, or a future state of rewards and punishments, cannot be admitted in any case.

† Persons who have not the use of reason are, from their infirmity, utterly incapable of giving evidence, as persons insane, idiots and lunatics, under the influence of their malady. But lunatics and other persons, who are subject to temporary fits of insanity, may be witnesses in their lucid intervals, if they have sufficiently recovered their understanding; and a person born deaf and dumb, is not, on that account, incompetent, but if he has sufficient understanding may give evidence by signs, with the assistance of an interpreter. A witness must not only have a competent share of reason, but also to know the nature of an oath; children, therefore, who are not able to understand its moral obligation cannot be examined. There seems to be no precise age fixed at which infants are excluded from being witnesses. If a child is too young to be sworn, it follows as a necessary consequence, that any account which may have been given to others ought not to be admitted.

‡ An interest to disqualify must be either an interest in the result of the cause, or of an interest in the record, as an instrument of evidence. It may further be observed, that it must be an interest in the result, as opposed to an interest in the particular question proposed to the witness. If the witness be interested in the immediate result of the cause, it is obvious that he is interested, in every answer which he gives which tends to that result, therefore is competent to answer any question in favour of the party who calls him, whether he be or be not interested in the particular question; for, being interested in the result, he is interested in any answer which in any way tends to that result. And therefore, in such cases, the nature of the particular question put to him is perfectly immaterial. It is now clearly established, that no interest in any disputed question will render a witness incompetent, who is not interested in the particular result or in the record; *Jordaine v. Lashbroke*, 7 T. R. 601; *Smith v. Prayer*, 7 T. R. 50; *Bent v. Baker*, 3 T. R. 27; *Abrahams v. Burn*, Burr. 225.

A Jew who considers himself a member of the estab

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lished church may be sworn on the Gos

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Or possibility of advantage does not constitute a sufficient interest to impeach; But the interest must be direct in the event of the suit, as a liability to pay costs;

### 3. CARTER V. PEARCE. E. T. 1786. K. B. 1 T. R. 163.

Per Buller, J. In order to show a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other.

### 3. JONES V. BROOKE. M. T. 1818. C. P. 4 Taunt. 464. S. P. TOWNSEND V. DOWNING. T. T. 1813. K. B. 14 East, 565.

Action against the acceptor of a bill accepted for the accommodation of the drawer, the Court of Common Pleas held that the drawer was not a competent witness for the defendant to prove that the holder received the bill on an usual consideration, on the ground that he was bound to indemnify the acceptor against the consequence of an acceptance made for his accommodation, and would therefore be liable to the acceptor not only for the principal sum, but also for all the costs with which he might be charged in this action. The liability to the costs of the action, as appears from various cases, is a substantial objection to the competency of a witness; and however indifferent he may be in other respects towards either party, yet if he has incurred such a liability, he has an immediate and direct interest in the event of the suit.

### 4. BENT V. BAKER. H. T. 1789. K. B. 3 T. R. 27.

Action against an underwriter on a policy of insurance. This case came before the Court of King's Bench, by writ of error, from the Court of Common Pleas; a writ of error was afterwards brought to reverse the judgment of that Court, but was at length abandoned. The principal question in that case was whether a person, who had been employed as broker by the plaintiff in procuring the policy to be subscribed by the defendant, and had afterwards himself subscribed the policy as assurer, was a competent witness for the defendant. The Court adjudged that he was competent.

Lord Kenyon, C. J., Buller, J., and Grose, J., held that he ought not to have been rejected on the broad and general ground, because he was not interested in the event. Ashhurst, J., on a narrower ground, because the witness stood in the particular situation of broker, and having made himself a party to the policy, he ought not to be allowed by his own act to deprive either party of the benefit of his testimony. The other judges concurred in that opinion; but by Lord Kenyon, C. J.: "The objection is," said he, "that the witness was underwriter on the same policy. I must acknowledge that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be extracted from them all. I think the principal is this, if the proceeding in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject, for that only goes to his credit, and not to his competency."

### 5. BURDEN V. BROWNING. T. T. 1806. C. P. 1 Taunt. 520. REE V. BARTON. T. T. 1804. K. B. 4 East, 581; S. C. 1 Smith, 202. S. P. BARTLETT V. PAKERGIDE. 4 East. 577. n.

Buller, J. That a record of conviction may be given in evidence in the same manner in a civil suit, it must be understood, at least, with this limitation, that the party who offers such evidence was not a witness on the prosecution. To admit the record as evidence on any other condition would in effect allow the party to a suit to give evidence for himself. The record in such a case seems from every principle inadmissible, and the rule must be the same whether the conviction was founded solely on his testimony, or whether his testimony was corroborated by other evidence.

### 6. EVANS V. WILLIAMS. T. T. 1788. K. B. 7 T. R. 481. n. S. P. FLEETON V. ATKINSON. M. T. 1797. K. B. 7 T. R. 480.

In action of *assumpsit* for money paid to the use of the parties, who were ship-owners, Lord Kenyon admitted the captain to prove that he had received the money from the plaintiff for the defendant's use, for he stood indifferent between the parties, and whichever way the verdict might go he was equally answerable.

Or the right of availing himself of the verdict or judgment.

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And the same rule holds where it was obtained only in part by his testimony.

But a witness having an interest inclining him to each party, is competent.



## 7. TRELAWNEY v. THOMAS. M. T. 1789. C. P. 1 H. Bl. 303.

A. having given a general bond to B. for the payment of money, which it is understood between them is to be applied towards indemnifying B. from the expenses of an election in which B. is a candidate. In an action brought by C. against D. for money advanced, and services performed, in supporting the interest of B., at the request of D., A. is not a competent witness.

Though where there is a persuasion of interest it incapacitates where its non-existence is not apparent.

## 8. WARDEN v. WILLIAMSON. E. T. 1805. C. P. 1 Taunt. 378.

One of several co-plaintiffs came forward voluntarily to disprove the defendant's liability to the demand made upon him. The Court said, he may be admitted with the consent of the adverse party, though, at the same time he defeats the claim of those who jointly sue with him; for if the plaintiff were to make a declaration against his interest out of court, evidence of declaration would be admissible; and how is the proof less credible (said Mansfield, C. J.) if with the consent of the defendant, who waives all objection to his testimony, he declares the same thing upon oath at the time of the trial.

One party may be witness for his adversary;

## 9. REX v. WOBURN. M. T. 1811. K. B. 10 East, 395.

*Per Cur.* As a party to the suit is not suffered to be witness in support of his own interest, so he is never compelled in courts of law to give evidence for the opposite party against himself, in a question of settlement between two parishes, the rated inhabitants of either parish, being, in reality, the parties to the proceeding, cannot be compelled by the adverse party to answer against their own interest.

Though he is not compellable.

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## 10. BROWN v. BROWN. E. T. 1808. C. P. 4 Taunt. 752.

A co-defendant, who suffered judgment by default, appeared as witness for plaintiff. *Per Cur.* He is not a competent witness for the plaintiff, for if the plaintiff succeeds he would be entitled to a contribution from the co-defendant; and, if the plaintiff fail, he himself will be liable to the whole of the demand.

A co-defendant after judgment by default is incompetent as a witness for plaintiff.

## 11. BENT v. BAKER. H. T. 1789. K. B. 3 T. R. 27.

*Per Cur.* Interest gained subsequent to the suitor having interest in the testimony of the witness does not render him incompetent.

(c) *From relative situation.* See *ante*, tits. Attorney; Deed; Principal and Agent.

Interest acquired since the suitor had an interest in his testimony, does not incapacitate.

(f) *Of restoring the competency.\**

## 1. REX v. GIBBURN. M. T. 1814. K. B. 15 East, 57.

On a question of settlement, where the point for the consideration of the Court of King's Bench was, whether a witness produced by the appellants could be examined after having admitted, in his examination on the *voire dire*, that he was the occupier of a cottage in the appellant's township, but that he had never been charged with or paid any public rate or tax in that township.

An incompetency appearing on the *voire dire* may, if of such a nature, be removed then.

The Court held, that there was no ground for objecting to his testimony, and that it was not necessary for the appellants to produce the rate in order to negative the rating.

## 2. ANON. H. T. 1791. K. B. 1 Burr. 423.

*Per Lord Mansfield, C. J.* It is said to have been solemnly agreed by the judges that, where a person had a legacy given him, and did release it, he was a good witness to prove the will.

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As by release,†

\* In ancient times it was effected in many cases by a proceeding then in use, called purgation. But it was afterwards found necessary to abolish this mode of trial by purgation, and therefore the stat. 18 Eliz. c. 7. s. 3, enacted, that persons admitted to the benefit of clergy should no longer be delivered to the ordinary for purgation, but, after the clergy allowed (now abolished) and burning in the hand, should forthwith be enlarged and delivered out of prison. In the construction of this statute the judges held that as the old mode of purgation was thus taken away, the burning in the hand should be considered as having the same effect in clearing away the disabilities of conviction. It was never the intent of the statute, said Lord Chief Justice Treby, in Lord Warwick's case, merely to set at large, and leave him a convict felon, but when it said "delivered" it meant delivered free from all incident and further penalties, as if delivered upon purgation. Hence the burning in the hand was considered in the nature of a statute pardon; Hob. 292.

† Whatever interest a witness may have had, if he is divested of it by release or payment, or any other means, when he is ready to be sworn, there is no objection to his competency. See particular titles according to the subject matter. *Semble*, that the

## II. RELATIVE TO THE ATTENDANCE OF.\*

## (A) SUBPŒNA.

1. BOWLES v. JOHNSON. M. T. 1748. K. B. 1 W. Blac. 37.

A witness must be subpoenaed, for it has been held that even a person actually present at the trial may refuse to be sworn unless he has been duly subpoenaed.

The subpoena or ticket should be served a reasonable time before the trial;

Unless the party be in court at London or Westminster at the time of the trial he may be subpoenaed then.

Per Wright, J. A person not properly subpoenaed is to be looked upon only as a stander-by, and it is no contempt of the Court of Nisi Prius for a stander-by to refuse to be examined, much less of this Court.

HAMMOND v. STEWART. H. T. 1781. K. B. 1 Stra. 510.

In this case the subpoena was not served till two o'clock in the afternoon in the city to attend the sittings that day in Middlesex, which the Court held was too short notice.

3. DOE, D. ANDREWS, v. JUPP. T. T. 1778. K. B. Cowp. 845.

This was an application for an attachment against J., the attorney for the defendant in this cause, for a contempt in refusing to give evidence upon being served with a subpoena ticket in court at the trial. J. was a subscribing witness to an agreement under which the ejectment was brought, and, in consequence of his refusal to give evidence of his attestation, &c., the plaintiff was nonsuited. The reason he assigned was, that, being the defendant's attorney, he was not bound to give evidence to the prejudice of his client. On showing cause against the attachment, an affidavit on the part of J. was read, stating that seven tickets had before been annexed to this subpoena whereas there ought to be only four persons' names to one subpoena, and that no oath was tendered to him. Lord Mansfield, J. I think the attorney's original misbehaviour is aggravated by his present defence. By attesting an instrument, a man pledges himself to give evidence of it whenever he is called upon. Here the attorney is in court, and refuses from corrupt motives avowed by himself. That he was attorney to the other side, is no reason for breaking his engagement with the plaintiff; an attorney has no privilege to refuse to give evidence of collateral facts: I have known an attorney obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury.

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4. SMALT v. WHITMILL. M. T. 1769. K. B. 2 Stra. 1054.

The service should be personal otherwise he cannot be attached for non-appearance.

An attachment was moved for against a witness for not attending, being subpoenaed, and having a shilling left. But it appearing not to be personal service, the Court held it not sufficient to warrant a proceeding criminally against him; whether it would do in an action they would not declare. It was also said that, though a shilling is what is constantly given with a subpoena, yet if the witness comes far there ought to be a tender of reasonable charges.

## (B) HABEAS CORPUS.

1. GERRY v. HOPKINS. M. T. 1701. K. B. 2 Ld. Raym. 851.

A prisoner in execution may be brought up by habeas corpus to give evidence.†

The plaintiff brought an action against the defendant for money received to his use, and upon other promises; and the question arose from the acceptance of one of Mr. Shepherd, the goldsmith's notes, who was become bankrupt, &c.; and notice for trial having been given. It was moved for a *habeas corpus* name of a witness inserted in the copy of the subpoena at the time of the service may be inserted in the original when the witness is called upon this subpoena; Wakefield v. Gill, Holt, 526.

\* The process which courts of law have instituted for the purpose of compelling the attendance of witnesses is by the writ of *subpœna ad testificandum*. This writ commands the witness to appear at the trial to testify what he knows in the cause, under the penalty of 100*l.* to be forfeited to the king. As only four witnesses can be included in one writ of subpoena, several writs are frequently necessary. In order to save expense, it is settled that leaving a ticket containing the substance of the writ will be as effectual as the writ itself, but the writ ought to be shown.

† If the witness be in custody at the time of the trial, the only way of bringing him into court to give evidence is by *habeas corpus ad testificandum*. This writ is obtained upon motion in court, or application to a judge at chambers, founded upon an affidavit stating that he is a material witness, and willing to attend.

‡ So, a sailor on board a king's ship may be brought up by this writ, if he have been previously subpoenaed and be willing to attend, Cowp. 672; but the Court will not grant this writ to bring up a prisoner of war. The proper way of proceeding in that case is by application to the Secretary of State; Dougl. 420. So, where the application appeared to be a mere contrivance to remove a prisoner in execution, the Court refused to grant it; 3 Burr, 1440. Also by stat. 44 Geo. 3. c. 10. s. 2, a judge of this court may award a writ.

*pus ad testificandum* to bring Shepherd out of the Marshalsea, where he was in execution, to Guildhall, which was granted.

2. *BARDUS v. SHORTER*. M. T. 1743. K. B. Barnes, 222.

Plaintiff moved for a *habeas corpus* to bring two prisoners in the Fleet, both charged in the execution, to the sittings at Guildhall, to testify in this cause, upon an affidavit of their being material witnesses; and a rule was made to show cause why such *habeas corpus* should not be granted.

The last time this question was before all the judges, seven against six were of opinion that the *habeas corpus* could not excuse the warden, but he would be liable to answer for an escape.

(C) *SUBPONA DUCES TECUM*.

1. *AMEY v. LONG*. T. T. 1808. K. B. 9 East, 473.

Per Lord Ellenborough, C. J. Upon a *subpoena duces tecum*, if the writing the witness is called upon to produce would have a tendency to subject him to a criminal charge, or to penalty, or any kind of forfeiture, the Court will excuse him from it, as well as from answering any question of the same tendency; but from analogy to the rule respecting parol testimony (and there seems to be no good reason for allowing a greater privilege in the one case than in the other), he would not be excused from producing a paper in his possession relevant to the matter in issue, on the ground that it might establish against him the fact of his being in debt, or subject him to a civil suit.

2. *AMEY v. LONG*. 1807. N. P. 1 Campb. 14.

It has been decided that an action will lie against a party who refuses to produce a paper in his actual possession, though the legal custody may belong to another.

(D) BEFORE JUSTICES.†

(E) BEFORE COMMISSIONERS OF BANKRUPT. See *ante*, tit. Bankrupt.

*MILES v. DAWSON*. 1795. N. P. 1 Esp. 405.

Per Lord Kenyon, C. J. A witness is not compellable by *subpoena duces tecum* to produce all papers which do not tend to criminate himself, but may withhold a document under which he derives title.

of *habeas corpus* to bring up a prisoner from any gaol or prison in the united kingdom, for the purpose of giving evidence in any court of record in England.

\* If a person who is not a party to the cause have in his possession any written instrument, &c. which would be evidence for the trial, instead of a common subpoena, he must be served with a *subpoena duces tecum*, commanding him to bring it with him and produce it at the trial. In *trover* against the messenger under a commission of bankruptcy, it was held that the defendant was not bound to produce the proceedings under the commission, though the defendant had notice given to produce them; *Law v. Wells, Peake*, 32. Kenyon, C. J. 1791. And it was held in one case that the solicitor under a commission of bankruptcy is not only not bound to produce the proceedings under a *subpoena duces tecum*, but that he would not be justified in so doing, as the papers belong not to himself, but to the assignees; *Bateson v. Hartsink, et al.* 4 Esp. 43. But it has been since ruled to be a public duty to produce the proceedings; *Pearson v. Fletcher*, 5 Esp. 90. In cases of this nature the discretion of the judge at *Nisi Prius* will guard the interests of third parties; *Corsen v. Dubois, Holt*, 239. Disobedience to the writ by the witness will not warrant the reception of parol evidence, but where the witness, in fraud of the subpoena, transferred the document to the adverse party in the cause, it was held that parol evidence was admissible; *Leeds v. Cook & Ux.* 4 Esp. c. 256.

† Magistrates have not, in general, any authority to compel the attendance of witnesses for the purpose of a summary trial, except under the special provision of acts of parliament; as the statute 2 and 3 Phillip and Mary, c. 10. requires them to take the examination of persons who bring a prisoner before them on suspicion of felony, it incidentally gives a power to examine them upon oath, and to summon by their warrant any other persons who appear to be material witnesses for the prosecution to appear before them and give evidence. And it may be laid down as a general rule that, wherever magistrates are authorized by act of parliament to hear and determine, or to examine witnesses, they have incidentally a power to take the examination on oath, *Dalt, Just.* c. 6; and see stat. 15 Geo. 3. c. 39. which gives such power for the purpose of levying penalties or making distresses,

‡ But it has since been held, that a solicitor may be compelled to produce his client's papers, where such production will not operate to his prejudice; *Copeland v. Watts* and another, executors of *Gabbins*, 1 Stark. 95. But the Court will satisfy itself, that no such consequence is likely to ensue before it will permit the instrument to be used; *Ibid.*

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Upon a subpoena duces

tecum,\*

the documents men-

tioned in it

must be produced

or a lawful

excuse stated.

Alleging that the instrument

belongs to another, if

it be in the possession of the wit

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ness, is no excuse.

But if it tend to criminate the witness it is an excuse.†

## (F) UNDER INCLOSURE ACT AND COURTS MARTIAL.\*

## (G) NON-ATTENDANCE OF.†

## (a) Action for.‡

AMEY v. LONG. T. T., 1808. K. B. 9 East, 473.

A declaration against a witness for not producing papers, averring that he could have produced them, and had no lawful excuse, suffices. §

The writ of *subpœna duces tecum* is of compulsory obligation on a witness to produce papers thereby demanded, which he has in his possession, and which he has no lawful or reasonable excuse for withholding, of the validity of which excuse the Court, and not the witness, is to judge; and in an action against a sheriff's bailiff for disobeying such writ, who, having been subpœnaed in a former action by the plaintiff against another to produce the warrant under which he acted, had neglected so to do, whereby the plaintiff was nonsuited; his ability to produce the warrant, and his want of just excuse for not producing it, are sufficiently alleged by stating that he could, and might in obedience to the said writ of subpœna, have produced at the trial the said warrant, and that he had no lawful or reasonable excuse or impediment to the contrary.

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## (b) By attachment.

1. HAMMOND v. STEWART. H. T. 1734. K. B. 1 Stra. 510.

A duly subpœnaed witness by not attending is subject to an attachment; ||

The defendant summoned one Turner, a witness, to attend the trial of the cause, who, on the service of the subpœna, said he would not attend, but run the hazard of forfeiting the 100*l.* penalty; and on affidavit of this it was moved for an attachment that the defendant might not be put to bring his action upon the statute, saying, that it was done every day in Chancery, even for not attending a Master upon his warrant; and in the principal case the Court made a rule to show cause. And this term the rule for an attachment nisi against the witness was discharged, it appearing that the subpœna was not served till two in the afternoon in the City to attend the sittings that day in Middlesex, which the Court said was too short notice, and that witnesses ought to have a reasonable time to put their affairs in such order that their attendance upon the court may be as little prejudicial to themselves as possible.

2. SMALT v. WHITMILL. M. T. 1768. K. B. 2 Stra. 1054.

If he were personally served, -

An attachment was moved for against a witness for not attending, being subpœnaed, and having a shilling left; but it appearing not to be personal service, the Court held it not sufficient to warrant a proceeding criminally against him; whether it would do in an action they would not declare. It was also said that, though a shilling is what is constantly given with a subpœna, yet if the witness comes far there ought to be a tender of reasonable charges.

3. CHAPMAN v. POINTER. E. T. 1773 K. B. 2 Stra. 1150.

And his reasonable expenses tendered. ¶

A witness was served with a subpœna at Chester, to attend at the sittings at

\* The General Inclosure Act, stat. 41. Geo. 3. c. 109. s. 33, 34. gives commissioners a power to summon in writing any person within a certain distance, to appear before them and be examined, and subjects them to a penalty in case they refuse to appear; and witnesses neglecting to attend on courts martial, after being duly summoned, are liable to be attached in the Court of King's Bench, &c. as if they had neglected to attend a trial in some criminal proceeding in that Court; stat. 55 Geo. 3. c. 108. s. 28.

† There are three ways of proceeding against a person who refuses or neglects to attend a trial, after being regularly served with subpœna for that purpose; by attachment; by action on the stat. 5 Eliz. c. 9; and by action at common law.

‡ By stat. 5 Eliz. c. 9. s. 12. if a person, being regularly subpœnaed as a witness, and having his expenses tendered to him, and not having any reasonable or lawful impediment do not appear according to the tenor of the process, he shall forfeit 10*l.*, and shall pay such damages to the party grieved as to the Court, out of which the process was awarded, shall seem meet. These damages must be assessed by the Court at Westminster, and not by the jury at Nisi Prius; and an action of debt will lie afterwards on such assessment; 2 Doug. 556. 561. But no action will at all lie unless the cause were called on and the jury sworn, Peake, 60; or, instead of this action on the statute, the party injured may have an action on the case against the witness for his non-attendance; 2 Doug. 556.

§ No action lies against a witness for not attending upon a subpœna, unless the cause were called on, and the jury sworn; Bland v. Swafford, Peake, 60.

|| Whether the cause were called or not; 3 B. & A. 598.

¶ Thus the full amount of what will probably be incurred must be tendered, Fuller v.

Guildhall, and two guineas were tendered by the person who served it, and being objected to as too little, he declared he would give no more.

The witness not coming up, an attachment was moved for, and, on showing cause, discharged, the Court saying it was too little, and that the witness is not obliged to trust to the Court's allowing him more when he comes to the book, for perhaps the party may not call him, and then it may be difficult for him to get home again.

### III. RELATIVE TO THE EXPENSES OF.\*

#### 1. HALLETT V. MEARS. T. T. 1814. K. B. 15 East, 15.

One who is subpoenaed as a witness and attends at the trial, but there refuses to give evidence unless his expenses are paid, and is thereupon not examined, may yet maintain *assumpsit* for his necessary expenses of attendance against the party who subpoenaed him; notwithstanding evidence of a promise to pay the expenses at the time of serving the subpoena, which, it was contended, was waived by the subsequent refusal to be examined.

#### 2. BARON V. HUMPHRIES. M. T. 1819. K. B. 3 B. & A. 118.

It seems that a party who is subpoenaed to attend at the assizes as a witness is guilty of contempt by neglecting to do so, although the cause be not called on for trial.

#### 3. WILLIS V. PACKHAM. H. T. 1816. C. P. 1 B. & B. 515.

In this case it was held, a witness cannot maintain an *assumpsit* for compensation for loss of time, although actually promised by the plaintiff. *Semb.* It is only allowed to medical men and attorneys.

#### 4. CROMPTON V. HATTON. M. T. 1806. C. P. 3 Taunt. 230.

Two opposite parties require a witness to attend, and he receives payment from both of them; although the payment made by the successful party be afterwards repaid by the loser in the taxed costs, the loser cannot recover back the amount from the witness in an action for money had and received.

#### 5. BENSON V. SCHNEIDER. T. T. 1819. K. B. 7 Taunt. 337; 1 Moore, 21.

A plaintiff (who had obtained a verdict) paid the expenses of a witness he had subpoenaed but not used, the witness concealing that he had been also paid before by the defendant, who also subpoenaed him, the plaintiff believing such to be a material witness on the trial, was held entitled to be allowed his expenses in taxing his costs.

paid the expenses is entitled to have repayment allowed on taxation of costs.

#### 6. STEPHENS V. CRITCHTON. H. T. 1802. K. B. 2 East, 259.

A party obtained leave, by consent, to examine witnesses abroad on depositions: the Court held he was not entitled to any allowance in the taxation of costs for the expense of taking the depositions, although he may proceed in the action. The same rule prevails in the Court of Chancery; if a party applies to that Court for a commission to examine witnesses, he must pay the expenses.

Prentice, 1 H. B. 49; and a reasonable time before trial, *Holme v. Smith*, 1 Mars. 410; 5 Taunt. 9. provided there have been no unreasonable delay in applying for the attachment; *Tidd*, 723.

\* If the witness live within the bills of mortality, and be required to attend at Westminster, or in London, a shilling only is given or tendered to him at the time he is served with a copy of the subpoena, 1 Sellon. 454, but if he live at a greater distance, or if required to attend at the assizes, his reasonable expenses of going and returning, and also during his necessary stay at the place of trial; 1 H. Bl. 49. calculated according to his situation in life, and the distance of his residence from the place of trial, 5 El. c. 9. must be paid or tendered to him. These expenses must be either paid or tendered to the witness and the sum tendered must be sufficient otherwise he is not bound to attend, 2 Str. 1150. and if the witness be a married woman, the money should be tendered to her, and not to her husband; *Cro. El.* 122; *W. Jon.* 430. The tender must also be made at the time of serving the subpoena; 1 W. Bl. 36.

† A witness who has been summoned before commissioners of a bankrupt may recover the expenses allowed by the commissioners, although he was a creditor and the allowance was by parol, *Yarker v. Botham*, 1 Esp. c. 65. under the stat. 1 Jac. 1. c. 15. s. 10.

‡ When a material witness resides abroad, or is going abroad, and cannot attend at the trial, the party requiring his testimony may move the Court in term time, or may apply to

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A witness may sue for his expenses, tho' he did not give evidence, because they were paid; So, he may where the cause was not called on.

But he cannot recover for loss of time even in special *assumpsit*.

A loser who pays a witness, the winner having done so also in the taxed costs, cannot recover it back.

But a plaintiff who has

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The expenses on examination by commission are borne by the party obtaining the rule.

The expense of bringing a necessary witness from a foreign country, broad, but not for his return, will be allowed.\*

7. COTTON v. WEST. H. T. 1807. C. P. 4 Taunt. 55.

In this case it was determined that, if a necessary witness is brought over from a foreign country after the commencement of an action, and gives evidence at the trial, the reasonable expenses of his passage over, and of his subsistence here, pending the action, will be allowed on the taxation of costs.

In the taxation of costs the expenses of the witness's return to his own country after the trial were not allowed.

8. LEURY v. BOWES. M. T. 1814. K. B. 3 M. & S. 89.

In this case the expenses of a person sent to inquire after the subscribing [ 422 ] witnesses to a bond not allowed in the taxation of costs.

But the expenses incurred in inquiry after a subscribing witness will not be allowed.†

9. HANBORN v. THOMAS. E. T. 1806. K. B. 3 Smith, 361.

Though where the necessity of the witnesses produced have been useless they were allowed.

Upon application to the attorney for the defendant to admit certain facts in proof, and he refused, and afterwards, upon going to trial, it appeared that, by having pleaded a tender it became unnecessary to prove them, but the plaintiff took the witnesses to the assizes for that purpose, and was allowed their expenses to a large amount in the taxed costs, notwithstanding they were not called upon the trial, the Court refused to disturb the taxation.

IV. RELATIVE TO THE EXAMINATION OF. See also *ante*, tit. Trial, p. 163.

(A) IN CHIEF.†

a judge in vacation, for a rule or order to have him examined on interrogatories *de bene esse* before one of the judges of the court; 2 Tidd. 312. The rule or order for such examination, which is only secondary evidence, cannot be obtained without the consent of both parties; and though the court cannot compel the other party to consent, yet if necessary it will assist the party applying by putting off the trial, that there may be an opportunity of filing a bill in equity, until the consent is obtained, or the witness returns; and if, after all the defendant should refuse, the Court will not give judgment as in case of a nonsuit; *Furley v. Newnham*, 2 Doug. 419; *Mostyn v. Fabrigas*, Cowp. 174; *Calliard v. Vaughan*, 1 Bos. & Pull. 211. Where the rule directs that the deposition of witnesses at X. and Y. be taken, and the direction is to persons at X., the expenses of bringing the witnesses from Y. to X. are allowable; *Muller v. Hartshorne*, 8 B. and P. 556.

\* Formerly the practice was to allow the costs of a witness brought from beyond sea only from his coming within jurisdiction of the Court; *Hagedorn v. Allnutt*, 3 Taunt. 379. Costs have been allowed for detaining here a foreign witness from the suing out of the writ until the trial; *Surdy v. Andrews*, 4 Taunt. 697. If a person is brought from abroad for the purpose of being a witness in an action, the Court will allow the costs of his detention and subsistence from the time of suing out the writ; *Schimmel v. Lonsada*, 4 Taunt. 695. Where a witness is sent for from abroad, *bona fide* for the purpose of the cause, and for no other, it is in the discretion of the prothonotary to allow the plaintiff the costs of bringing him over, and of sending him back, though he should have been sent for and have arrived before the commencement of the action; *Tremain v. Faith*, 1 Mars. 563; 6 Taunt. 88. A., abroad, furnishes goods to B. at the request of C., who draws a bill on B. payable to A., which C. refuses to accept; A. sends for a witness from abroad for the support of an action against B., pending which action C. arrives in this country. A. then discontinues his action against B., and commences another against C., in which he recovers by means of the witness whom he has brought from abroad: held that C. is only liable for the costs of the witness while detained in this country, and not for those of bringing him over, or of sending him back; *Tremain v. Barrett*, 1 Mars. 463; 6 Taunt. 88.

† So, contingent losses will not be allowed; *Thelluson v. Naples*, Doug. 438.

‡ In the direct examination of a witness, he must not in general be asked leading questions; *Peake*, Ev. 195; and see *Stark*. 81. Yet, where a witness swears to a certain fact, and another is called for the purpose of contradicting him, the latter may be asked directly whether the fact took place; 1 Campb. 43. So, if the witness appears evidently hostile to the party who has called him, the counsel may put leading questions to him in the same manner as in cross-examination, having first obtained the permission of the court to do so; *Pease*, Ev. 198. The plaintiff or defendant shall not be allowed to call witnesses to disprove what his witness has already sworn, 5 St. Tr. 2. 764. 793; unless, perhaps, where what the witness swears is palpably false, and it would be a great injustice to allow the party's case to be sacrificed for that reason; 2 Campb. 556; 2 Stark. 384. But the opposite party may call witnesses for that purpose, or may give in evidence what the same witness swore at another time about the same matter, in order to prove a variance, and thereby detract from his credit, 2 Hawk. c. 46. s. 41; so, a letter written by the same

1. *GOODTITLE, D. ROVELL, v. BRAHAM.* H. T. 1792. K. B. 4 T. R. 497.

A witness, clerk of the Post Office, accustomed to inspect franks for the detection of forgeries, was examined to prove that the handwriting of an instrument was an imitated, and not a natural, hand. This question was objected to, but allowed by the Court; the clerk swore that the hand was imitated; and they were then asked if they could judge whether the instructions were written by the person who wrote the memorandum? This question was also objected to, as being a comparison of hands; but allowed by the Court.

Lord Kenyon, C. J., mentioned a case where a decypherer had given evidence of the meaning of letters without explaining the grounds of his art, and where the prisoner was convicted and executed. And Buller, J., said it was like the case of Wells Harbour, where persons were allowed to give evidence of opinion.

The witness must be examined as to facts and not opinions, unless it be on a question of skill.\*

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2. *TURNER v. PEARSE.* E. T. 1787. K. B. 1 T. R. 717.

This action was brought for withdrawing suit from the mills of the plaintiffs, situate in the manor of Leeds, which suit they claimed as lords of the manor. The defendant set up an exemption as being situated within the manor of Whitkirk cum Membris, which was part of the possession of the Knights of St. John of Jerusalem, the tenants of which manor had always been exempt from witness contradictory to his present testimony, 2 Esp. 601. and, a fortiori, depositions of the same witness taken de bene esse may be given in evidence for the same purpose.

An objection to the witness's competency may be made at any time during the trial.†

\* Hence, the opinion of a witness as to the effect of a clause in a policy is not admissible; *Syers v. Bridge*, Dougl. 509; but the practice under similar circumstances would be legal evidence; *Ibid.* Neither is the opinion of a broker, whether particular facts ought to have been disclosed to the underwriter, admissible; *Carter v. Boehm*, Barr. 1905. But in general, wherever the inference is one of skill and judgment, the opinion of experienced persons is admissible, for by such means only can the jury be enabled to form a correct conclusion. An engineer may be examined as to his judgment on the effect of an embankment on a harbour, as collected from experiment; *Folkes v. Chad*, Mich. 28 Geo. 3. cited in *Goodtitle v. Graham*, 4. T. R. 498. Upon the question whether a seal has been forged, the testimony of a seal engraver as to the difference between the impression in question and a genuine one is also admissible; by Lord Mansfield, in *Folkes v. Chad*, cited in 4 T. R. 498; and see ante. tit. Handwriting. So, the testimony of medical men is constantly admitted with respect to the cause of disease or of death, in order to connect them with particular facts, and to the general sane or insane state of the mind of the patient, as collected from a number of circumstances, such opinions are admissible in evidence, although the professional witnesses found them entirely on the facts, circumstances, and symptoms established in evidence by others, and without being personally acquainted with the facts.

† If the supposed incompetency arise from the witness having been convicted of any crime, you must prove the record of conviction to produce it; *Bull. N. P. 292*; 8 East, 77; *Arch. Pl. & Ev. 389*; *Stark. 183*; 1 Holt. 541. As to cross-examining the witness himself upon the subject of any offence imputed to him, there seems to be a difference of opinion among the judges upon the point; some hold that you cannot ask a question of a witness the answer to which in the affirmative would subject him to punishment; others, that you may ask the question but he is not bound to answer it; and others, I believe include in the rule not only questions, the answers to which might subject the witness to punishment, but also all those where the witness, by his answer, might be obliged to allege his own infamy or turpitude, although they might not subject him to punishment. In *Rex v. Holking and Wade*, O. B. Jun. 1821, Bayley, J., held, that a witness may be asked a question, the answer to which may subject him to punishment, but he is not compellable to answer it. All other questions for the purpose of impeaching a witness's character may not only be put but must be answered. If the witness be examined as to the offence imputed to him, and deny it, such denial is conclusive, and you cannot afterwards call witnesses to offer evidence to contradict him, 2 Stark. 149. et seq.; 2 Camp. 637; or, if general evidence be given of the bad character of a witness, the opposite party may cross-examine the witness as to the grounds of their opinions, if he think it prudent to do so; or he may call witnesses to speak of the general good conduct of the witness, or contradict any particular facts the other witnesses may have disclosed in their cross-examination; *Arch. Sum. C. L. 102*. If the supposed incompetency arise from interest, the witness may be examined respecting it; 1 Esp. 409. 46 Geo. 3. c. 37. s. 1. If he acknowledge that he was once interested, he will be allowed afterwards to prove that his interest has determined without producing the instrument by which his interest was so determined; *Peake, Ev. 196*; 1 Esp. 160. 164; and see *Camp. 14*. 2 Stark. 333; but if his interest have been proved by other witnesses, the instrument which has determined it must be produced. And in all cases where a release is necessary to give competency to a witness, it must be produced and proved; *Arch. Pl. & Ev. 389*. 396.

[ 424 ] from doing suit to the mill of the lord of the manor of Leeds; and the defendant brought evidence to prove that the houses in respect of which this exemption was claimed were situated within the part of Whiterkirk, and were distinguished by the mark of a cross. The jury found a verdict for the defendant; and a new trial was moved for upon two grounds: First, That it was a verdict against evidence. Secondly, Upon an affidavit that it had been discovered since the trial that five out of nine of the witnesses on the part of the defendant were interested in the event of the cause; and, therefore, were incompetent and ought not to have been received.

Ashhurst, J. The regular time for objecting to the competency of witnesses is at the trial. The ancient doctrine on this head was so strict, that, if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that strictness may in some degree be relaxed by the custom of suffering witnesses to be examined conditionally, which is only waiving the objection for the time; but still the objection must be made at the trial. Besides, the affidavit on the part of the plaintiffs is answered as to the bias which might be supposed to be on their minds; for they swear that they did not know of any subscription at the time of giving their evidence.

(B) CROSS-EXAMINATION.\*

1. THE QUEEN'S CASE. E. T. 1818. C. P. 2 B. & B. 286.

It was resolved by the judges that if, on cross-examination, it is proposed to ascertain of a witness whether he has made representations of any particular nature; immediately after being asked whether he made any representations, he must be asked whether he made the representation by parol or in writing.

2. THE QUEEN'S CASE. T. T. 1818. C. P. 2 B. & B. 286.

In the course of the late proceedings in the House of Lords, in the Queen's case, Louisa Dumont, a witness in support of the charge, having been asked upon cross-examination whether she did not use certain expressions which the counsel read from a supposed letter from the witness to her sister, it was objected by the Attorney General that the letter itself ought to be put in before any use could be made of its contents.

The following questions were in consequence proposed to the judges.

First. Whether in the courts below a party on cross-examination would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked the witness whether the witness wrote the letter, and his admitting that he wrote such letter?

Secondly. Whether, when a letter is produced in the courts below, the Court would allow a witness to be asked upon showing a witness only a part of it, whether he wrote such part, or such one or more lines; and in case the witness shall not admit that he did or did not write the same, the witness can be examined to the contents of such letter?

The first question was answered in the negative, for the following reason:—The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself, and by that alone, if the paper be in existence. The proper course, therefore, is to ask the witness whether or no that letter is of the hand-writing of the witness? If the witness admits that it is of his or her hand-writing, the cross-examining counsel may, at his proper season, read that letter as evidence; and when the

\* When the direct examination is finished, the witness may be cross examined by the counsel for the opposite party. But if the party calling a witness do not think proper to examine him after he is called and sworn, he may nevertheless be cross examined by the counsel for the opposite party, 1 Esp. 357; 2 Stark. 472. In cross examining a witness, the counsel may ask him leading questions, or indeed any questions at all relevant to the cause; 4 Esp. 68. He may even be cross-examined as to a fact irrelevant to the issue for the purpose of discrediting his testimony by what he himself may state in evidence; 2 Camp. 637; but otherwise where it is done with the intention of calling other witnesses to disprove what he says; 7 East, 108.

On the cross examination the witness's testimony cannot be impeached by proof until the fact has been ascertained. And a witness cannot be asked upon cross examination whether he has written such a thing, the proper course being to put the paper into his hands and to ask if it be his writing.

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letter is produced, then the whole of the letter is made evidence. One of the reasons for the rule requiring the production of written instruments is, in order that the Court may be possessed of the whole. If the course which is here proposed should be followed, the cross-examining counsel may put the Court in possession only of a part of the contents of the written paper, and thus the Court may never be in possession of the whole, though it may happen that the whole, if produced, may have an effect very different from that which might be produced by a statement of a part.

To the second question the judges returned the following answer:—In answer to the first part, namely, whether when a letter is produced in the courts below, the Court would allow a witness to be asked upon showing the witness only a part, or one or more lines of such letter, and not the whole of it, whether he wrote such part? The judges are of opinion that that question should be answered by them in the affirmative in that form; but in answer to the latter part, which is this: "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter?" the learned judges answer in the negative, for the reason already given, namely, that the paper itself is to be produced, in order that the whole may be seen and the one part explained by the other.

Upon the further question proposed; whether when a witness is cross-examined, and upon production of a letter to the witness under cross-examination, the witness said that he wrote that letter, the witness can be examined in the courts below? whether he did or did not make statements such as the counsel shall, by questions addressed to the witness, inquire, are or are not made therein? or whether the letter itself must be read as the evidence to manifest that such statements are, or are not, contained in the letter? The judges were of opinion, that the counsel cannot, by such questions addressed to the witness, inquire whether or no such statements are contained in the letter; but that the letter itself must be read to manifest whether such statements are, or are not, contained in that letter. They founded their opinion upon what, in their opinion, is a rule of evidence as old as any part of the common law in England; namely, that the contents of the written instrument, if it be in existence, are to be proved by that instrument itself, and not by any parol evidence. To another part of the question, viz. in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the courts below to be read, the learned judges answered that, according to the ordinary rule of proceedings in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence in his turn after he shall have opened his case, that is the ordinary course; but that, if the counsel who is cross-examining suggests to the Court that he wishes to have the letter read immediately, in order that he may, after the contents of the letter shall have been made known to the Court, found certain questions upon the contents of that letter, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below. And for the convenient administration of justice, the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such a letter considered as part of his evidence.

(C) *RE-EXAMINATION.\**

\* As the object of re-examining a witness is to explain the facts stated by the witness upon cross-examination, the re-examination is of course to be confined to the subject-matter of cross-examination. Where the witness has been cross-examined as to declarations made by him, a counsel has a right, on re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but he has no

right to go farther, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness; the Queen's case, 2 B. & B. 297. Where a witness has been cross-examined as to a conversation with the adverse party in the suit, whether criminal or civil, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit, because it would not be just to take part of a conversation as evidence against a party, without giving him, at the same time, the benefit of the entire residue of what he said on the same occasion; *Ibid.* 208.

But, in the Queen's case eleven of the judges were of opinion that the conversation of a witness with a third person stood upon a different footing, and was distinguishable from the case of a conversation with a party on the following grounds, viz. The conversation of a witness with a third person is not in itself evidence in the suit against any party in the suit: it becomes evidence only as it may effect the credit of the witness, which may be effected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the Court, the Court becomes possessed of all which can effect the character or credit of the witness, and all beyond this is irrelevant and incompetent. Upon these grounds eight of the judges (Best, J., *dissentiente*) were of opinion that if, on the trial of an action, or indictment, a witness examined on behalf of the plaintiff, or prosecutor, upon cross-examination by the defendant's counsel, states, that at a time specified he told A. that he was one of the witnesses to be examined against the defendant, and being re-examined by the plaintiff's or prosecutor's counsel, states what induced him to mention this to A., the plaintiff's or prosecutor's counsel cannot further re-examine the witness as to such conversation, even as far only as it relates to his being one of the witnesses. Abbott, C. J., in delivering the opinion of the judges, observed, the question, as proposed by the house, contains these words, "and being re-examined, had stated what induced him to mention to A. what he had so told him?" by which I understand the witness had fully explained his whole motive and inducement to inform A. that he was to be one of the witnesses; and so understanding the matter, and there being no ambiguity in the words "I am to be one of the witnesses," I think there is no distinction between the previous and subsequent parts of the conversation, and I think myself bound to answer your lordship's question in the negative.

His Lordship then gave the reasons of the eight judges for distinguishing between a conversation between the witness and a party, and one between the witness and a third person, to the effect above stated. Best, J., was of opinion that the rule that was acknowledged to have been settled, as to conversations of a party to the suit, applied with equal reason and force to the statements and conversation of a witness; and held that, if one part of the conversation of a witness had been drawn from him by cross-examination, with a view of disparaging his testimony, the whole of what passed in that cross-examination ought to be admitted on re-examination: that is justly due to the character of the witness, who is entitled, in vindication of his character, to have the entire conversation fairly and fully detailed in evidence. It was due to him also as a security against proceedings which might otherwise be constituted against him on statements partially extracted on cross-examination. The Lord Chancellor and Lord Redesdale also differed from the majority of the judges. As the learned judges were pleased to guard their opinion by stating that they understood the question to assume that the witness had fully explained his whole motive and inducement to inform A., the decision in the particular instance thus presented to them cannot be drawn into precedent as a very general rule, inasmuch as in many instances the caterp-

## (D) CREDIT OF WITNESS, HOW IMPEACHED.\*

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porary statement made by the witness would be the best exposition of his real motives.

\* The credit of a witness may be impeached either by cross-examination, subject to the rules already mentioned, or by general evidence affecting his credit; *De Saily v. Morgan*, 2 Esp. C. 691; *Christian v. Combe*, 4 Esp. C. 489; or by evidence that he has before done or said that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves. It is perfectly settled, on the grounds already adverted to, that the credit of a witness can be impeached by general evidence only, and not by evidence as to particular facts; *Delamotte's C.* 21; *Howell's St. Tr.* 311; *Sharpe v. Scoging*, *Holt's C.* 541. It is also a general rule, that whenever the credit of a witness is to be impeached by proof of anything that he has said or declared, or done, in relation to the cause, he is first to be asked, upon cross-examination, whether he has so said or declared.

The *Queen's case*, 2 B. & B. 300. "or done that which is intended to be proved." If the witness admits the words "declaration or act," proof on the other side becomes unnecessary and an opportunity is afforded to the witness of giving such reasons, explanations or exculpations of his conduct, if any there be as the circumstances may furnish; and thus the whole matter is brought before the Court at once, which is the most convenient course; But the judges in the *Queen's case*, 2 B. & B. 313. If the witness deny the words "declaration or act" imputed to him, then, if it be not a matter collateral to the cause, witnesses may be called to contradict him; *Ibid.* So, if the witness decline to answer on account of the tendency of the question to criminate him the adverse party is still at liberty to adduce the same proof; the *Queen's case*, 2 B. & B. 314. And the possibility that the witness may on that ground decline to answer affords no sufficient reason for not giving him the opportunity of answering, with a view to explain the circumstances, and to exculpate himself; *Ibid.* And it is of great importance that this opportunity should be thus afforded, not only for the reasons already suggested, but because such explanation, if not given in the first instance, may be rendered impossible; for a witness who has been examined, and has no reason to suppose that his further attendance is requisite, often departs the court, and may not be found or brought back until the trial be at an end; By the judges in the *Queen's case*, 2 B. & B. 314. There is no distinction for these purposes between declarations made by the witness, and acts done by him which relate to the cause, the *Queen's case*, *Ibid.* in the one case as well as in the other, an opportunity must be afforded the witness of explaining his conduct before evidence is adduced to impeach his credit by proof of the fact. If the adverse counsel has omitted to lay such a foundation by previously interrogating the witness on the subject of those declarations, the Court will of its own authority, call back the witness, in order that the requisite previous questions may be put; By the judges in the *Queen's case*, 2 B. & B. 314.

And even although the facts be adduced in order to impeach the witness's testimony be not discovered until after the conclusion of the cross-examination, the rule still holds, and evidence cannot be given for the purpose of thus impeaching his testimony without previous examination of the witness, even although the witness should have departed the court, and cannot be brought back after the discovery has been made; the *Queen's case*, 2 B. & B. 212. In order to impeach the credit of a witness for the defendant, upon an information for assaulting revenue officers, by proving that on an information before two magistrates against the same defendant for having smuggled goods in his possession, proof of the conviction, containing the testimony of the witness, is insufficient; it is unnecessary to prove it by the testimony of those who heard what was said; *Rex v. How*, 1 Camp. 461. The record of conviction is conclusive for the purpose for which it is intended, that is, to prove the condemnation; but it is no evidence to prove the testimony of the witness.

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(E) CREDIT OF WITNESS, HOW SUPPORTED.\*

(F) OF THE SOURCES FROM WHICH HE MAY DERIVE INFORMATION OR REFER TO.

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1. RAMBERT V. COHEN. 1796. N. P. 4 Esp. 213.

Lord Kenyon, C. J., held that, although an unstamped receipt for the payment of a bill is not admissible in evidence, yet the fact of payment may be

ses. After proof in a criminal proceeding that the prosecutor has employed A. B., an agent, to procure and examine witnesses in support of the charge, it is not competent to the defendant to examine a witness to that A. B., who is not examined as a witness, had offered to bribe him to give evidence upon the trial, or bring papers with him belonging to the defendant; for the mere employment of an agent for the purpose of procuring and examining witnesses is in itself an innocent, and in many cases a necessary, act. And it is not to be presumed that the prosecutor directed the agent to use any unlawful means for the purpose; neither can any legitimate inference or conclusion be drawn from this fact against the credit and veracity of the witnesses who are examined; for it is not to be presumed, in the absence of all proof, that they were either parties to the illegal act, or privy to it, or to any act of the like nature; By the judges in the Queen's case, 2 B. & B. 302. As upon an indictment for a conspiracy, it is competent to the prosecutor to prove, in the first instance, the existence of a conspiracy by general evidence, without proving participation by the defendant; 2 B. & B. 303; so it is competent to a defendant on a criminal charge, first, to prove a conspiracy to suborn witnesses for the destruction of his defence, and afterwards to effect the prosecution by proof of participation; the Queen's case; 2 B. & B. 303. 309; provided proof of such a conspiracy would afford a legitimate ground of defence; 2 B. 311. But query in what cases proof of a crime committed by a prosecutor in so conspiring can afford any legal defence to a defendant.

\* Where the character of the witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and in all cases where the credit of a witness has been attacked, whether by general evidence, or by particular questions put upon cross-examination it seems that the party who called is at liberty to support his testimony by general evidence of good character; Rex v. Clarke, 2 Starkie's C. 241. So, if the character of the attesting witness to a deed or a will be impeached on the ground of fraud, evidence of his general good character is admissible; Doe, d. Walker, v. Stephenson, 3 Esp. C. 284; 1 Camp. 210; 4 Esp. C. 50. But the mere contrariety between the testimonies of adverse witnesses without any direct imputation of fraud on the part of either supplies no ground for admitting general evidence as to character; Bishop of Durham v. Beaumont, 1 Taunt 107. The general rule has already been noticed that former statements made by a witness whose credit is impeached, are not admissible for the purpose of confirmation; except in particular instances, where the statement was made at the time when the witnesses laboured under no interest or influence to misrepresent the fact. Where a register of baptism stated the child to be seven years of age at a time of baptism, it was held that the entry was no evidence to prove the age on an issue to try whether the party was of age when he was arrested. But, Bayley, J., expressed an opinion that, if it could have been shown that the entry had been made upon the representation of the mother, who was called as a witness for her son in order to prove his minority, the fact would have been admissible to support her testimony upon its being impeached; Wiken v. Law, 3 Starkie's C. 63. Where a bail-bond had been witnessed by the defendant's clerk, who, upon being subpoenaed at the defendant's counting-house said that he should not attend, and the trial had been put off twice on account of his absence, and search had been made for him at the defendant's house, and at Margate, in consequence of the information received at the defendant's house that he was gone thither, without effect, and that search had continued up to the time

proved by a witness who saw the money paid; and even such an unstamped receipt may be shown to the witness as a memorandum to refresh his memory. the purpose of aiding the memories of witnesses."

2. JACOB v. LINDSLEY. T. T. 1801. K. B. 1 East, 460.

The plaintiff had entered an account in writing of goods and money, from time to time, forwarded to the defendant; and by the signature at the foot of each page admitted the truth of the items; but the writing itself could not be given in evidence for the want of receipt stamps, as the cash items in each page exceeded 40s.; yet it was held that the plaintiff might prove that, upon calling over each article to the defendant, he admitted the receipt, and that the witness who heard him might refresh his memory by referring to the account. [ 430 ]

## V. RELATIVE TO WITNESSES ABROAD.†

## VI. RELATIVE TO SECONDARY EVIDENCE IN RELATION OF WITNESSES. See *ante*, tits. Evidence; Parol Evidence.

## VII. RELATIVE TO THE PRIVILEGES OF.‡

ANON. E. T. 1804. K. B. 1 Smith, 355.

On motion to stay proceedings against defendant, he having been arrested of the trial; it was held that secondary evidence was admissible; Burt v. Walker. 4 B. & A. 697. A subpoenaed witness after giving evidence is entitled to

\* Hence a memorandum formerly made by an aged witness was allowed to be read to him at the trial in order to refresh his memory: Vaughan v. Martin, 1 Esp. C. 440; Doe v. Perkins, 3 T. R. 749. And where a witness who had received money and given a receipt for it which could not be read in evidence for want of a proper stamp had become blind, the receipt was read to him in Court for a similar purpose; Cult v. Howard, 3 Starkie's C. 3. Where a witness refreshes his memory from memorandums, it is usual and reasonable that the adverse counsel should have an opportunity of inspecting them for the purpose of cross-examining the witness; per Lord Eyre, C. J., Hardy's case, 24 Howell's St. Tr. 824. Although a witness cannot be examined as to the contents of a written document not produced, yet he may, in some instances, be examined as to the general result from a number of documents too voluminous to read in court; Meyer's Assignees v. Sefton, 2 Starkie's C. 276; Roberts v. Dixon, Peake's C. 83.

† A party, after obtaining leave by consent, examines witnesses abroad on depositions, will not be entitled to any allowance in the taxation of costs for the expense of taking the depositions, although he may proceed in the action. The same rule prevails in the Court of Chancery: if a party applies to that Court for a commission to examine witnesses, he must pay the expenses. The defendant, as well as the plaintiff, may apply for a mandamus to examine witnesses under the stat. 13 Geo. 3. c. 63. s. 44; Grillard v. Hogue, 1 B. & B. 519; 4 Moore, 313. Where the commission directed the commissioners to examine the witnesses on interrogatories, and to reduce the examination in writing in the English language, and to answer an interpreter to interpret the depositions of such witnesses as did not understand the English language; and it appeared by the return that the depositions, in the first instance, were reduced into writing in the foreign language, and translated by the interpreter into English within an interval of six weeks; it was held, that the commission was well executed; Atkins v. Palmer, B. & A. 337. Where A., the captain of an Indian country trader, contracted in India with B. for a crew according to the custom of the country, and A. arrived in England with the crew, and then made a voyage with them to the West Indies and back; on an action being brought by one of the crew for wages due on the West India voyage, it was held, on a motion for a mandamus under the stat. 13 Geo. 3. c. 68. s. 44. that the cause of action did not arise in India; Francisco v. Gilmore, 1 B. & P. 177. Where the witnesses for a defendant, indicted for a misdemeanour, resided in Scotland, the Court obliged the prosecutor to consent to the examination of the witnesses before one of the courts there; per Lord Mansfield, in Mostyn v. Fabrigas, Cowp. 174.

‡ Witnesses, as well as suitors, attending courts of justice, are privileged from arrest, eundo, morando, et redeundo: Lighfoot v. Cameron, 2 Bl. Rep. 1113; Meckins v. Smith, 1 H. Bl. 636. But a witness may be taken when attending court, and surrendered by his bail; and in ordinary cases it is not necessary, for the protection of a witness, that he should have been served with a subpoena; Arding v. Flower, 8 T. R. 534; 3 Esp. 117; S. C. *sed vide*, Anon. 2 Salk. 544. Although, in strictness, this privilege does not authorize a witness to loiter on or deviate from the direct road, yet the Courts have not been rigorous in limiting this protection to the shortest intervals.

[ 431 ] while returning home under the protection of a subpoena; it appeared that he lived only twelve miles from the place where the trial was had; that it was over in the afternoon; that on the next morning he continued in town, and was preparing to go home; and at twelve o'clock he was arrested; to pay which the attorney for the defendant wrote a letter, offering to give a *cognovit*.  
 a reasonable time for return-  
 ing home.\*

Lord Ellenborough, C. J. Taking it at eleven o'clock, which is between ten and twelve, as there is some doubt as to the time of his arrest, I think that is high time for the defendant to go home. At least the letter is an acknowledgment, and when it was written the parties did not think there were sufficient grounds for an application to the Court.

## VII. RELATIVE TO THE NUMBER OF.

[ 432 ]

### (A) GENERAL RULE.†

(B) IN TRIALS FOR PERJURY. See *ante*, tit. Perjury.

(C) IN TRIALS FOR TREASON. See *ante*, tit. Treason.

### (D) IN COURTS OF EQUITY.‡

### (E) IN THE ECCLESIASTICAL COURTS.§

\* But in a previous case, where a witness attending a trial which terminated about four in the afternoon, remained in the assize town until after dinner on the following day, and whilst returning home was arrested about seven in the evening, the Court ordered her to be released from custody, though her residence was not above twenty miles from the place of trial; *Hatch v. Blisset*, Gib. Rep. 308; S. C. cited 2 Stra. 986; 4 Bro. Ab. 226. A witness, however, is not compelled to avail himself of the nearest road to his place of residence, and when he has not abused the privilege for the purpose of transacting business unconnected with the cause in which he was engaged, he will be entitled to be liberated from custody; *Willingham v. Matthews*, 6 Taunt. 358; S. C. 2 Marsh. 57. It has been intimated, that the proper mode of obtaining the discharge of a person in attendance as a witness in an action appointed for immediate trial is to bring him up before a judge at chambers by writ of habeas corpus; *ex parte Tolletson*, Stark. 470; but it appears the judge presiding at Nisi Prius may order the sheriff's officer who made the arrest to produce him in court on the day nominated for the trial.

† The general rule at common law is, that a single witness, if credible, is sufficient for the proof of any fact, in which respect the law of England differs from the civil law, where one of the maxims is "*unius responsio non omnia audiatur*." Lord Coke, indeed, has said in his Commentary (Coke Lit. 6. b.), that when a trial is by witnesses, as in the case of the challenge of a juror, or summons of a tenant, the affirmation ought to be proved by two or more witnesses. Where the trial is by verdict, there the judgment is not given upon witnesses, but upon the verdict, and upon such evidence as is given to the jury they find their verdict. But this distinction has been denied by Lord Holt, *Shotton v. Friend*, Carth. 144. and the doctrine is said to be warranted by the authorities cited in its support. By our law, however, the testimony of a single witness will not be sufficient in a few particular cases.

‡ It is an established principle in courts of equity that, on a bill praying relief, when the facts charged by the plaintiff as a ground for obtaining a decree are proved only by a single witness, and are clearly and positively denied by the answer of the defendant, the Court will not grant a decree against the defendant; *L'Neve v. L'Neve*, 1 Ves. 64. 66; 3 Atk. 646; S. C. 1 Ves. 97. 125; 2 Ves. jun. 243; *East India Company v. Donald*, 9 Ves. 282, 283. But where the evidence produced by the plaintiff is so far supported and corroborated by proof of concurring circumstances as to outweigh the denial in the defendant's answer, *Walton v. Hobbs*, 2 Atk. 19; *Janson v. Rany*, lb. 140; *Peimber v. Mathers*, 1 Bro. Ch. Ca. 52; *Toole v. Medlicott*, 1 Ball & Beatty, 403; *Biddulph v. St. John*, 2 Sch. & Lef. 521; abstracting from the mind that the evidence on the part of the plaintiff comes from a disinterested witness, 9 Ves. 283; the evidence of a single witness, so strengthened and confirmed will enable the Court to decree against the answer; and there are many cases in which the court has granted a decree against the defendant on the testimony of a single witness, when his testimony has not been clearly and positively contradicted by the answer; 2 Atk. 650; 1 Ves. 66. 97; 12 Ves. 80; 3 Ves. & Beam. 59.

§ By the civil law, as was before observed, two witnesses are required for the proof of a fact, and such is the rule in Ecclesiastical Courts, whose practice is founded upon that law; but even in those courts, if a matter cognizable at common law arises incidentally in an ecclesiastical suit, (as where a revocation of a will is pleaded, or payment of a legacy, or plene administravit, and the like,) the proof ought to be according to the principles and course of the common law; and if they disallow the plea because it is proved only by a single witness, they may be controlled by a prohibition; *Sir W. Juxon v. Lord Byron*, 2 Lev. 64; *Richardson v. Disbrow*, 1 Vent. 291; *Shotton v. Friend*, Carth. 142; 1 Ld. Raym. 221; Corp. 424; Com. Dig. tit. Prohibition.

**Woman.\*** See *ante*, tits. *Abduction; Abortion; Adultery; Baron and Femme; Rape; Seduction.*

**Words.** See *ante*, tit. *Slander.*

**Work and Labour.**

[ 433 ]

I. RELATIVE TO, IN GENERAL.

(A) WHERE THERE IS A SPECIAL CONTRACT, OR A GENERAL OR IMPLIED ONE, p. 433.

(B) OF THE ACTION FOR THE RECOVERY OF PRICE.

(a) Form, of action, p. 434. (b) Holding to bail in, and of the affidavit of defendant, p. 434. (c) Declaration, p. 435. (d) Pleas, p. 438. (e) Damage, p. 438.

II. ———, IN PARTICULAR.

See tits. *Apothecary, Apprentice, Arbitration and Award, Attorneys, Auction and Auctioneer, Bankrupt, Barristers, Master and Servant, Physician, Principal and Agent, Printer, Sheriff, Ship and Shipping, Stock Joint Company, Witness.*

I. RELATIVE TO, IN GENERAL.†

(A) WHERE THERE IS A SPECIAL CONTRACT, OR THE CONTRACT IS GENERAL OR IMPLIED.

\* PEPPER v. BURLAND. M. T. 1791. Peake, 103.

Assumpsit for work and labour as a carpenter. The defendant proved that the plaintiff contracted to do all the carpenter's work necessary to be done in a house which the defendant was building for a certain sum. It was admitted that the roof of the house had been done in a manner different from that specified in the contract, and the defendant had paid money into Court sufficient to cover the excess. A plan was produced, and proved by the plaintiff wherein the dimensions of the house were stated to be fifteen feet, but the house on which the work was done was seventeen feet. It did not appear that the plaintiff had ever seen this plan before he began to work; but the house was begun by the bricklayer on the scale of seventeen feet before any contract was made with the plaintiff. Lord Kenyon. I have often declared, and have had the good fortune to have my opinion adopted by juries, that where some additions are made to a building which the workman contracts to finish for a certain sum of money, the contract shall exist as far as it can be traced to have been followed, and the excess only paid for according to the usual rate of charging. I think that the plaintiff has failed in showing the plan by which he contracted to work to be the same as that produced. I admit that, if a man contracts to work by a certain plan, and that plan is entirely abandoned, it is impossible to trace the contract, and say to what part of it the work shall be applied; in such case the workman shall be permitted to charge for the whole work done by measure and value as if no contract at all had ever been made; but in the present case the contract is not proved to have been wholly abandoned, for "it appears that the dimensions were the same when the plaintiff contracted as they were when the building was finished. The only excess was in the alteration of the roof, and money enough to cover that has been paid by the defendant into court.—Verdict for the defendant.

See *Ellis v. Hamlin*, 3 Taunt. 58; *Dunn v. Body*, 1 Stark. 220; *Robson v. Godfrey*, 1 Stark. 275; 1 Holt, 263. S. C.

(B) OF THE ACTION FOR THE RECOVERY OF THE PRICE OF.

\* A woman is capable of being elected to the office of sexton, and may vote at the election of a candidate for such office: *Olive v. Ingram*, 7 Mod. 263; *Stra.* 1114. S. C. A woman may be appointed governor of a work-house, and may act by deputy; *Anon.* 2 Ld. Raym. 1014.

† We have already seen that the Stat. of Frauds\* (see *ante* tit. *Frauds, Stat. of*) does not extend to the case of a contract, strictly for work and labour and materials, as an agreement to make or build a ship, chariot, &c.; 1 *Stra.* 506; 6 T. R. 17; 3 East, 305. Hence it is clear that there is no obligation in ordinary cases, that a contract for work and labour should be in writing, a parol or verbal engagement being legally binding.

## (a) Form of action.\*

## (b) Of the holding to bail in, and of the affidavit of defendant.

YOUNG V. GATJERS. M. T. 1818. K. B. 2 M. &amp; S. 603.

An affidavit to hold defendant to bail for personal services must allege that the remuneration is due from the plaintiff to the defendant.†

The affidavit to hold to bail stated, that the defendant, master or commander of the *Olive*, was justly and truly indebted to the plaintiff for the work and labour of the plaintiff and his workmen and servants, done and performed in and on board the said ship, and for materials found and provided by the plaintiff, and used and applied therein; and also for goods sold and delivered, and money paid, laid out, and expended by the plaintiff, at the special instance and request of the defendant; not stating "for the defendant," or that the goods were sold "to the defendant," was holden to be defective; for although the cause of action stated in the affidavit is work done on board the ship, it does not result as a necessary consequence from those premises, that the defendant is indebted as captain, he only being liable upon his express contract; and from the terms of the affidavit, the inference is that the work, &c. may not have been done for a third person.

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Where a specific sum is fixed as the price

## (c) Declaration.†

1. HARRIS V. WATSON. 1790. N. P. Peake, 72.

The declaration stated, that the plaintiff being a seaman on board the ship *Alexander*, of which the defendant was master and commander, and which

\* The nature of the remedy to be adopted for the non-performance of a contract to pay for services performed must necessarily depend upon the fact of whether the agreement was under seal or a simple contract; if by deed, the action must be debt or covenant; if not under seal, assumpsit or debt.

† In an action for work and labour, or other personal services, where the stipulated duties have been performed on the part of the plaintiff, and the remuneration is to be in money, the defendant may be holden to bail, as of course; but where the remuneration sought to be recovered is not strictly for work and labour actually done, or if the contract has not been executed by the plaintiff, although the defendant prevented its performance, as the declaration must be special, *Hulle v. Heightman*, 4 Esp. 77; 2 East, 145; *S. C. Appleby v. Dods*, 8 East, 300; *Wilkinson v. Frasier*, 4 Esp. 133; *Waugh v. Carver*, 2 H. Bl. 235. and the damages uncertain, the security of the bail cannot be obtained. But an affidavit, stating that the defendant was indebted to the plaintiff for wages due to him for his services on board the defendant's ship, was considered sufficient, without an express averment that the debt was due from the defendant; *Symonds v. Andrews*, 5 Taunt. 751; 1 Marsh, 317. *S. P. Bliss v. Atkins*, 1 Marsh, 317. n. In the latter case it will be however observed, that it distinctly appeared on the face of the deposition, that the vessel was the property of the party sought to be charged. Although a special contract has been entered into, the plaintiff is permitted, in certain cases, to recover upon the general indebitatus count. Thus, where there is a special agreement, the terms of which have been performed, it raises a duty for which an indebitatus will lie; *B. N. P. 139*; *Robson v. Godfrey*, Holt, 237. So, if there has been a special agreement, and the work is begun, though not pursuant to such agreement, the plaintiff may recover upon the quantum meruit, for otherwise he would not be able to recover at all; but the defendant may refuse to take to the subject matter of the plaintiff's work and labour, where there is a deviation from the special contract; and in such case the plaintiff cannot recover on the quantum meruit, *Ellis v. Hamlin*, 3 Taunt. 52; 4 Taunt. 478; though it is otherwise where the defendant has acquiesced in and adopted the deviations; *Burn v. Miller*, 4 Taunt. 745. Where there is a special contract, but additional work has been done not included in the special contract, the value of the additional work may be recovered under the indebitatus count, although, from the stipulations of the special contract, as to credit, &c. the value of the work done under the special contract cannot be recovered.

‡ Under the general count for work and labour the plaintiff may give evidence of a particular species of work and labour, such as a farrier and the medicines administered by him may be considered as materials within the count; *Clarke v. Memford*, 3 Campb. 37; and see *Meeke v. Oxlande* 1 N. R. 289. But where the claim "for materials found," &c., was omitted in the count for work and labour, it was held that the plaintiff, who sought to recover for building a house and furnishing the timber, could not recover for the latter end of the count for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322. It is a rule that however special the agreement was, yet if it was not under seal, and the terms of it have not been performed on the plaintiff's part, and the remuneration was to be in money, it was not necessary to declare specially, and the common indebitatus count is insufficient; *Fitzgib. 302*; 1 Wils. 117; *Bul. N. P. 139*; 1 Bos. and Pul. 139; 7 T. R. 181; 4 East, 147; 1 New. Rep. 104; *Id.* 355; 6 East, 569; 1 New. Rep. 339; 2 Bos. & Pul. 323; 5 Taunt. 302; 2 Marsh, 273; 4 Campb. 176. But if the remuneration sought to be recovered be not strictly for work and labour done, 2 Marsh, 273. a.; but see 5 Taunt. 302; *Fitzgib. 302*; cont.: or if the contract had not been executed by the plaintiff, al-



was bound on a voyage to Lisbon, whilst the ship was on her voyage the defendant, in consideration that the plaintiff would perform some extra work in navigating the ship, promised to pay him five guineas over and above his common wages. There were other counts for work and labour, &c.

The plaintiff proved that the ship being in danger, the defendant, to induce the seaman to exert themselves, made the promise stated in the declaration.

Lord Kenyon. If this action was to be supported, it would materially af-

[ 436 ]  
a subse-  
quent pro-  
mise to pay  
an addition-  
al sum for  
the same  
services as  
nudum pac-  
tum."

though the defendant prevented his performance, the declaration must be special, 2 East, 145; 1 Hen. Bla. 287; 4 East, 147; 1 New Rep. 330; 2 Bos. and Pol. 321; 1 Marsh. 122; but see Camp. 186. Where the demand is for wages, fees, or work and labour in particular professions, &c. it is usual to insert a count, stating concisely the nature of the service, &c. 2 Lev. 153; Carth. 276; 1 Mod. 8; 1 Sid. 425: but the common count for work and labour is in general sufficient; 3 Camp. 37; 2 Wils. 20; 1 New Rep. 289; 2 Saund. 350. n. 2. 373. Where the defendant requested the plaintiff to take care of, and show his, the defendant's house, and promised to make him a handsome present, it was held that the plaintiff might expect a reasonable recompence for his work and labour; *Jenny v. Bask*, 5 Taunt. 302. But where a person performs work for a committee under a resolution entered into by them, that any service rendered by him should be taken into consideration, and such remuneration made as shall be deemed right, it was held that an action would not lie to recover a recompence for such work, *Taylor v. Brewer*, 1 M. & S. 290. Where the work has not been executed according to the contract, the party for whom it is executed may repudiate it, and in such case the plaintiff cannot recover; *Ellis v. Hamlin*, 3 Taunt. 52. So, if the defendant has received no benefit from the work having been improperly executed by the plaintiff, the latter cannot recover; *Farnsworth v. Garrard*, 1 Campb. 38; *Duncan v. Blondell*, 3 Stark. 6; *Montiron v. Jefferies*, 1 R. & M. 317. Thus, an auctioneer, through whose gross negligence a sale becomes nugatory, can recover nothing for his services; *Denew v. Davey*, 3 Campb. 451. But where the defendant has derived some benefit from the plaintiff's services he must pay pro tanto, *Farnsworth v. Garrard*, 1 Campb. 38; and if he seeks to reduce the plaintiff's damages on account of a non compliance with the terms of the contract, he should, as it seems, give notice to the plaintiff that he considers the contract not complied with. The illegality of the transaction will also furnish a defence. A party cannot be permitted to sue for either work or labour done, or materials provided, where the whole combined forms one entire subject matter made in violation of the provisions of an act of parliament; *Bensley v. Bignold*, 5 B. & A. 835. So, the printer of an immoral and libellous work cannot maintain an action for his bill against the publisher who employed him; *Poppett v. Stockdale*, 1 A. & M. 337. But where the plaintiff was employed to wash clothes for the defendant, a prostitute, and knew her to be such, and the clothes consisted principally of expensive dresses and some gentlemen's nightcaps, it was held that he was entitled to recover; *Lloyd v. Johnson*, 1 B. & P. 340. n.

\* Nor will such an action lie when the contract is made on shore, and the extra work is occasioned by the desertion of a part of the crew; *Silk v. Meyrick*, 6 Esp. 129; 2 Campb. 317, where Lord Ellenborough approved of the decisions in the case in Penke; 1 Marsh. 567; 3 B. & P. 612. Where however it is expressly agreed between the parties that the work shall be gratuitously done, the contract is nudum pactum, and the party undertaking to perform the work is not bound so to do, though he is liable if, having actually proceeded on the employment, he be guilty of any misfeasance in the course thereof to the injury of the other party; 5 T. R. 143; 1 Saund. 312. c. note. An action cannot be maintained for services performed with a view to a legacy, and not in expectation of a reward in the nature of a debt; *Stra*, 728; 1 Esp. R. 188. A workman who has bestowed his labour upon a chattel has a lien for the remuneration due to him, whether the amount was fixed by the express agreement of the parties or not; and although the chattel was delivered to him in different parcels, and at different times, if the work to be done under an agreement be entire. But it seems that no lien exists, if, by the bargain, a future day of payment be agreed upon; for in such case the detention of the chattel would be inconsistent with the terms of the contract; 5 M. and S. 180.

A lessor contracted to pay his tenant at a valuation, for certain erections pursuant to a plan to be agreed on, provided they were completed in two months. No plan was agreed on; and after the condition broken, the lessor encouraged the lessee to proceed with the work, and it was held that the lessee might recover as for work and labour, on an implied promise arising out of so many of the facts as were applicable to the new agreement; 4 Taunt. 75. The destruction of the work by an accidental fire, or other misfortune, before it was finished or delivered, does not deprive the workman of his right of remuneration to the extent of the work performed, 3 Barr. 1592, unless by the express and uniform custom of any particular trade that no payment is to be made unless the work be completed and delivered; 1 Taunt. 137. A person who contracts to build a house, furnishing both timber and labour, cannot recover for the materials, on a count for goods sold and delivered although by reason of a deviation from the original plan, the contract is superseded as to

[ 437 ] fect the navigation of this kingdom. It has been long since determined, that when the freight is lost, the wages are also lost; *Harman v. Bawden et al.* 3 Burr. 1844; *Abernethy v. Langdale*, Dougl. 520. This rule was founded on a principle of policy; for if sailors were, in all events to have their wages, and in times of danger entitled to insist on an extra charge on such a promise as this, they would in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to take.—The plaintiff was nonsuited.

2. *BELL v. DRUMMOND.* H. T. 1790. N. P. Peake, 45.

An action will not lie for a deputy against his principal for an increase of salary, without an express agreement when the latter has been appointed to a new office.\*

This was an action of assumpsit for work and labour done and performed by the plaintiff for Paterson, the testator. It appeared that the testator was clerk to commissioners of the land-tax, and that the plaintiff had done the business of his office at a salary of 100*l.* a-year. That afterwards on new duties (such as the servant's taxes) being imposed, the testator was appointed clerk to the commissioners of those duties, and the plaintiff also transacted that business, but no agreement had been made as to any increase of salary, though the labour of the office was considerably increased.

Lord Kenyon said, that the plaintiff's case rested wholly on the fact of the new duty being imposed upon him; he should not think it such a case as would have entitled him to come into a court of justice for an additional stipend, or a *quantum meruit*; if it was, every porter in a shop, or clerk in an office, would, upon an increase of his master's business, be equally entitled to demand an increase of wages.

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(d) *Pleas.*†

(c) *Of the damages.*

*UPSDELL v. STEWART.* M. T. 1793. Peake, 194.

In an action by a surveyor, he is only entitled to a reasonable compensation not to be estimated by

Assumpsit for work and labour as a surveyor. The plaintiff demanded 34*l.*, being 5*l.* per cent. on all money charged by, and allowed to, the different tradesmen. The defendant had paid one half of the sum demanded into court, contending that two-and-a-half per cent. was a sufficient compensation for the business the plaintiff had done. He had done nothing more than measure the work, and settle the bills, not being at all employed in building the house.

Lord Kenyon. The plaintiff is entitled to a reasonable compensation for his labour, but he is not to estimate that by the money laid out by the defen-

the price; 6 Taunt. 322. The registered owner of a ship is not liable for repairs, unless actually done upon his credit. Legal ownership is *prima facie* evidence of liability, which may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship; 1 R. and M. 42. 119. 202; 2 Bing. 179. If an engineer be employed by a committee for erecting a bridge and forming a road to it to make an estimate of the expense, he is bound to ascertain for himself, by experiments, the nature of the soil, although a person previously employed by such committee, having made the experiments, give him, by their desire, information of the result; *Money Penny v. Hartland*, 2 C. and P. 378; S. C. 1 C. and P. 352. If an engineer so employed make a low estimate, and thereby induces persons to subscribe for the execution of the work who would otherwise have declined it, and it turns out afterwards that such estimate is incorrect, either from negligence or want of skill, and that the work cannot be done but at a much greater expense, he is not entitled to recover any thing for making such estimate; *Id.* In an action for work and labour in curing a flock of sheep and lambs, consisting of 497, of the scab, it was proved that the plaintiff had declared that he did not expect to be paid unless he cured all; and it appearing that 40 out of the flock were not cured, held that he was not entitled to recover anything; *Bates v. Hudson*, 6 D. and R. 3.

\* Nor can a foreign consul, resident in this country, and receiving a salary for acting as an officer from his own government, maintain an action for any trouble and labour he may have been put to in transacting business for merchants here, in which he acted in conformity to the express instructions of his own government; 1 R. & M. 45.

† The nature of the plea to be adopted, in answer to an action for work and labour, must of course be governed by the nature and form of the declaration. It will suffice here to observe that, in cases of this description, if the declaration be in assumpsit, the defendant, under the plea of non assumpsit, may object to the quality of the work, the quantity done, or resist the action upon the ground of the contract not being performed, or being illegal. The same observations apply to the plea of *nil debet* in an action of debt on a simple contract.

dant in finishing his building. I am bound to give my opinion on the matter of law. The jury will answer to the fact. I am enabled to state from the record what is the true question between the parties. The plaintiff states his demand to be "as much as he reasonably deserves to have for his work and labour." Does he reasonably deserve to have for this an exorbitant demand? As to the custom offered to be proved, the case of the robbery on Bagshot Heath might as well be proved in a court of justice. It ought not, nor cannot, be supported.

the amount laid out by the defendant in the building, which is the custom with the surveyors.\*

### Wreck.†

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\* But in a subsequent case Lord Ellenborough left it to the jury to say, whether the usual commission of five per cent. was an unreasonable mode of charging; and the jury found for the plaintiff the whole demand; *Chapman v. De Taste*, 2 Stark. 294; *Maltby v. Christie*; 1 Esp. 340.

† By the common law, and as declared by the statute *De Prerogative Regis*, 17 Edw. 2. stat. 2, c. 11, the king is entitled to wrecks; 1 Bla. Com. 290. The prevention of the barbarous practice of destroying persons who, in ship-wrecks, approached the shore, in order to acquire the property of the shipwrecked, was the object of the law in conferring this prerogative on the king; *Cro. Jur. Belli*. 117, 132, 141; 2 Inst. 167; *Molloy*, 237; *Moor*, 224; *Hale*, *De Jure Mar.* 40.

There are four sorts of shipwrecked goods, flotsam, jetsam, ligan, and wreck properly so called; 1 Bla. Com. 292. Flotsam is where the ship is split, and the goods float upon the water between high and low water mark. Jetsam is when the ship is in danger of foundering, and for the purpose of saving the ship, the goods are cast into the sea. Ligan, lagan, or ligam, is when heavy goods are thrown into the sea with a buoy, so that the mariners may know where to retake them. These are also the king's if no owner appear to claim them; but if any owner appear, he is entitled to recover the possession; for even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not, by this act of necessity, construed to have renounced his property; much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property; *Ibid*. Wreck, properly so called, is where goods shipwrecked are cast upon the land; and goods which are termed flotsam, jetsam, and ligan, become, and are deemed, wrecks if they be cast upon the land. All these species of wreck *prima facie* belong to, and were originally in, the crown by virtue of his prerogative. Being rights of a secondary nature, they may belong to a subject by express grant or prescription, and are frequently vested in lords of manors. If, however, a subject prescribe, or have a grant for wreck only, he shall not have jetsam, flotsam, or ligan; 5 Co. 107.

The ancient common law as to wrecks was very strict in favour of the king; but as the country became more civilized, mitigations of such severities were gradually introduced, and by the common law laid down by Bracton, in the reign of Henry III., neither ships nor goods were considered wrecks if there were any sign designating the right of the owner, who appeared and claimed them; 2 Inst. 157; Bracton, lib. 3. fol. 120; 1 Bla. Com. 291, &c. And by the stat. 3 Edw. 1, c. 4, concerning the wrecks of the sea, it is agreed that, where a man, a dog, or cat, escape quick, i. e. alive, out of the ship, that such ship or barge, or any thing within them, shall not be adjudged a wreck; but the goods shall be saved and kept by view of the sheriff, coroner, and the king's bailiff, and delivered into the hands of such as are of the town where the goods were found; so that if any sue for those goods, and can prove that they were his, or his lord's, or perished in his keeping, within a year and a day, they shall be restored to him without delay; and if not, they shall remain to the king, and be taken by the sheriffs, coroners, and bailiffs, and shall be delivered to them of the town; the translations previous to Pulton, read "bailiffs of the town," to answer before the justices of the wreck belonging to the king. And where wreck belongeth to another than to the king, he

[ 440 ] **Writ.** See *ante*, tit. *Process*.

**Writ of Error.** See *ante*, tit. *Error*, *Writ of*.

**Writ of Right.** See *ante*, tit. *Right*, *Writ of*.

**Year.** See *ante*, tit. *Time*.

shall have it in like manner. And he that otherwise doth, and thereof be attainted, shall be awarded to prison, and make fine at the king's will, and shall yield damages also; and if a bailiff do so, and he disavowed by his lord, and the lord will not pretend any title thereunto, the translations previous to Pulton read "will not discharge him thereof," the bailiff shall answer if he have whereof; and if he have not whereof, the lord shall deliver the bailiff's body to the king. This statute has received a very liberal construction, for it was past to check the abuse of the royal prerogative to the prejudice of merchants. The act relates as well to flotsam, jetsam, and ligan, as to wreck, properly so called, 5 Co. 107; 2 Inst. 167; and the instance of a dog or cat is only put in the statute by way of example, *Ibid.*; and, therefore, in every case where the owner of the ship or goods can come forward and prove his property, the king has no claim to them. Therefore if a ship be pursued by enemies, and the mariners come on shore, and leave the empty floating ship, which comes to land without any person in it, yet if the mariners can prove the property in the ship, the king is not entitled to it; *Ibid.*; Molloy, 239. Notwithstanding the statute, the interest in property shipwrecked vests in the king or his grantee, even before seizure and without office found against all but the right owner; 5 Co. 107. The statute only divests this interest in cases where the owner, or his executor or administrator, if he die within the year or day, 2 Inst. 168, pursues the course pointed out by the statute. The owner must therefore apply for the return of his property within a year and a day from the time of the seizure of it, by the persons mentioned in the statute; 5 Co. 107. But if he sue for its return before the expiration of the year and a day, it is sufficient, although the verdict be not given within that time, for the delay of the law must do no man an injury; *Ibid.* 168. The king is not restricted to the year and day mentioned in the statute, and consequently, if the grantee of wrecks take the king's goods as wreck, the king may claim them after that period; 2 Inst. 168.

If goods wrecked be *bona peritura*, the king or lord may sell them, even before the year and day be past; for the statute shall not be understood to compel them to keep those things which of their own nature cannot be kept; *Ibid.* Plowd. Com. 465. 466; 12 Co. R. 73, Parkers, R. 72; and see same principle, Ventr. 313. It should seem, however, that the produce of the articles so sold would be governed in all respects by those rules which would have applied to the articles themselves. Where the king is entitled to wrecked property, he is entitled to a right of way over any man's grounds to obtain it; 6 Mod. 149. "Quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non posset." It may be worthy of observation, that the king may by the stat. 27 Geo. 3, s. 2, c. 13, seize goods taken by pirates, where the property is unknown, and detain them until proof of property is made; and if they be perishable goods, the king may sell them, and, upon proof, restore the value; Parker's R. 72; see Chit. jun. Prer.

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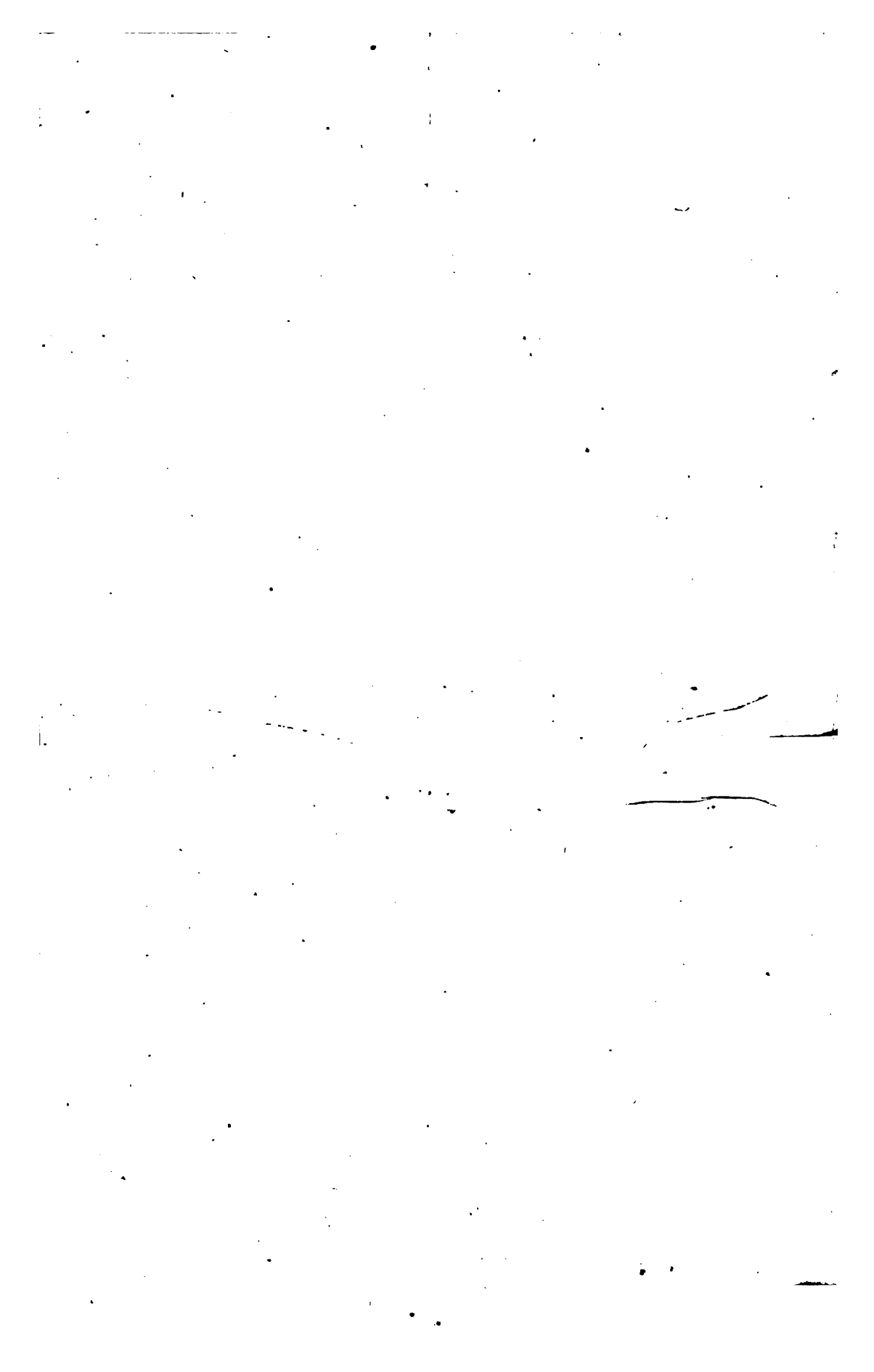
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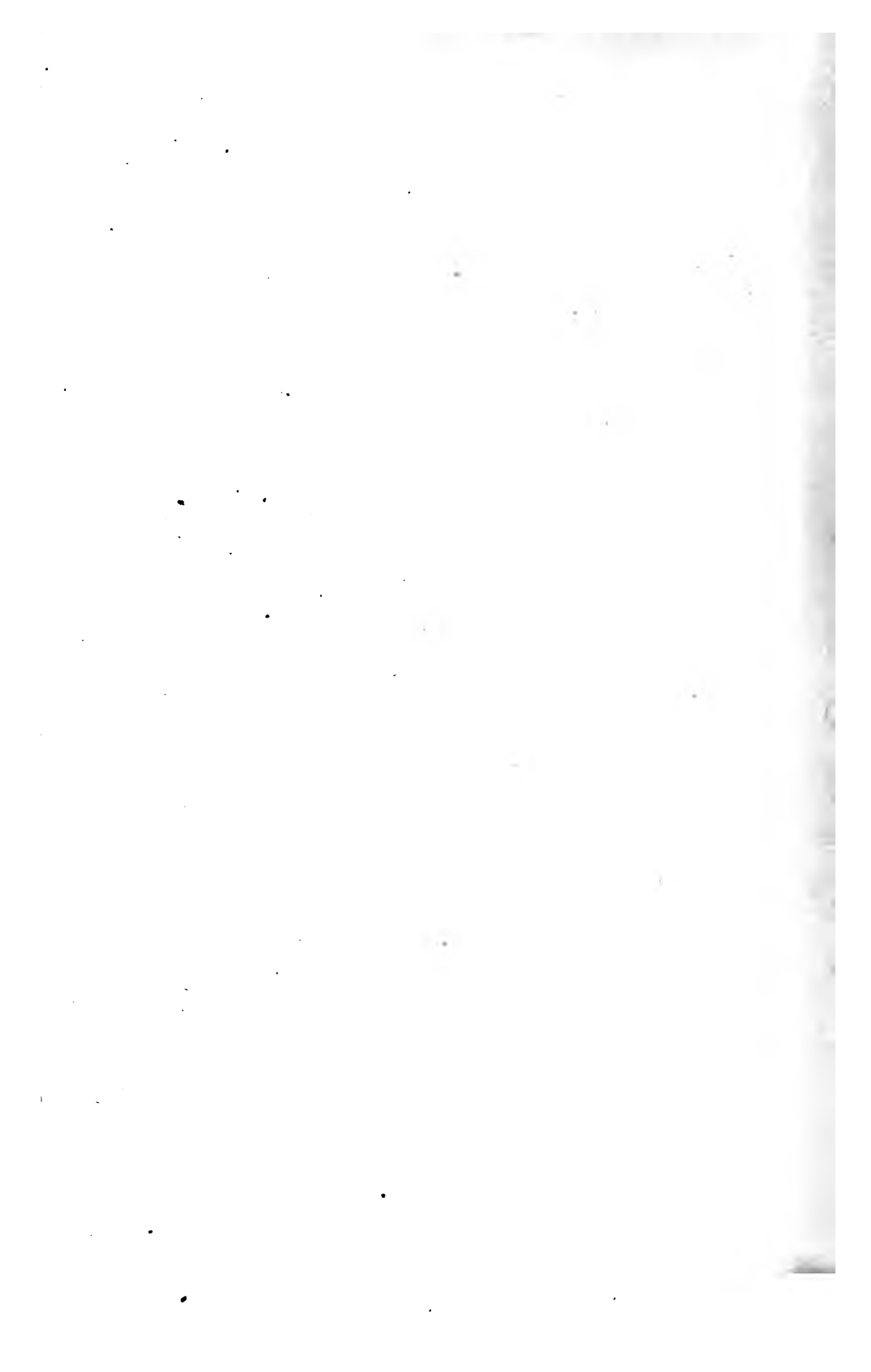
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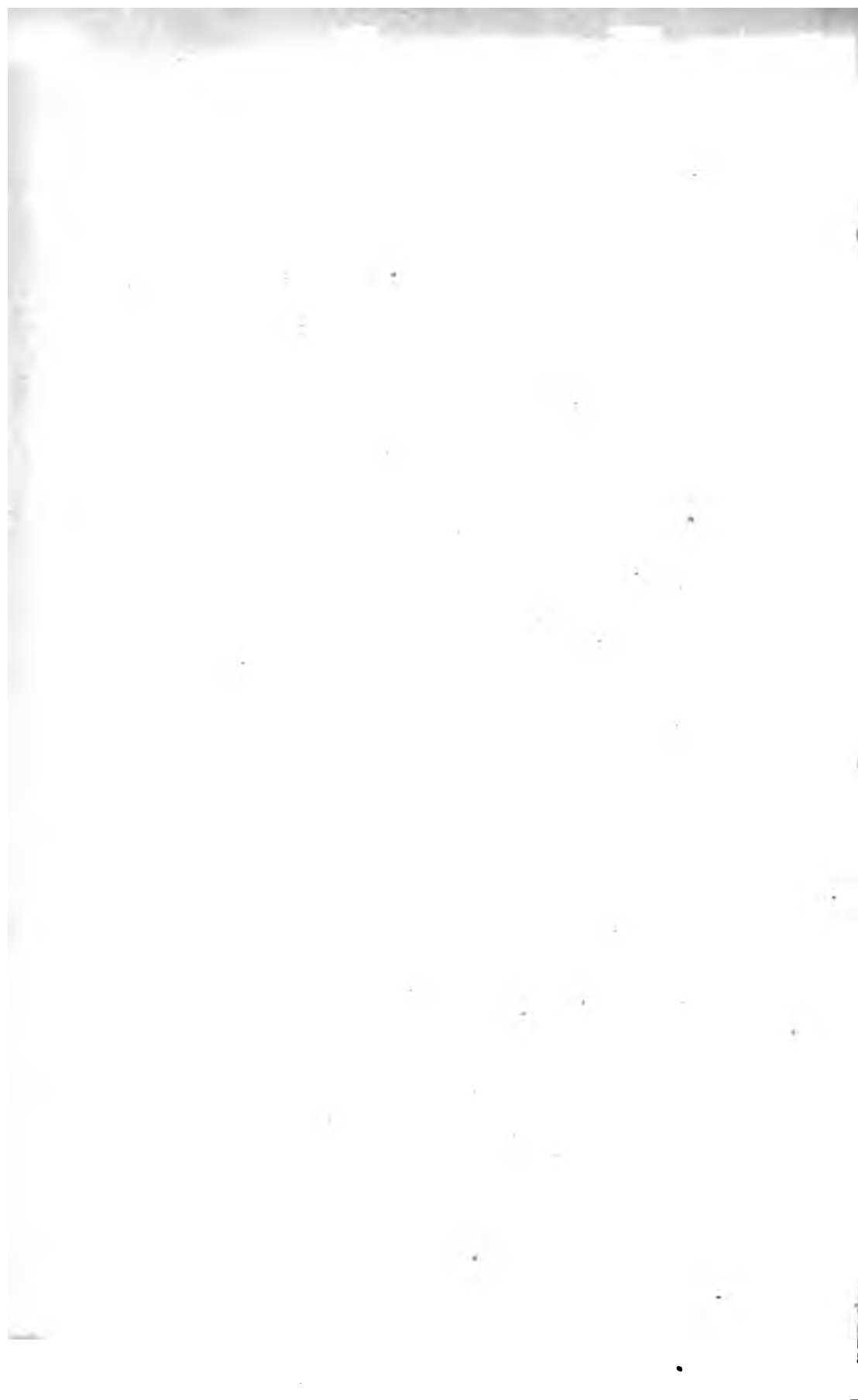
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